TAB 5

***Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36.**

(Source: CanLII.org)

11.52 (1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge — in an amount that the court considers appropriate — in respect of the fees and expenses of

(a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;

(b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and

(c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

2005, c. 47, s. 128; 2007, c. 36, s. 66.

TAB 6

2010 CarswellOnt 212

Canwest Publishing Inc., Re

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, C-36, AS AMENDED AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE ORARRANGEMENT OF CANWEST PUBLISHING INC./PUBLICATIONS CANWEST INC., CANWEST BOOKS INC. AND CANWEST (CANADA) INC.

Ontario Superior Court of Justice [Commercial List]

Pepall J.

Judgment: January 18, 2010
Docket: CV-10-8533-00CL

Counsel: Lyndon Barnes, Alex Cobb, Duncan Ault for Applicant, LP Entities

Mario Forte for Special Committee of the Board of Directors

Andrew Kent, Hilary Clarke for Administrative Agent of the Senior Secured Lenders' Syndicate

Peter Griffin for Management Directors

Robin B. Schwill, Natalie Renner for Ad Hoc Committee of 9.25% Senior Subordinated Noteholders

David Byers, Maria Konyukhova for Proposed Monitor, FTI Consulting Canada Inc.

Subject: Corporate and Commercial; Insolvency

Bankruptcy and insolvency.

Business associations.

Cases considered by *Pepall J.*:

Anvil Range Mining Corp., Re (2002), 2002 CarswellOnt 2254, 34 C.B.R. (4th) 157 (Ont. C.A.) — considered

Anvil Range Mining Corp., Re (2003), 310 N.R. 200 (note), 2003 CarswellOnt 730, 2003

CarswellOnt 731, 180 O.A.C. 399 (note) (S.C.C.) — referred to

Canwest Global Communications Corp., Re (2009), 2009 CarswellOnt 6184, 59 C.B.R. (5th) 72 (Ont. S.C.J. [Commercial List]) — followed

Grant Forest Products Inc., Re (2009), 2009 CarswellOnt 4699, 57 C.B.R. (5th) 128 (Ont. S.C.J. [Commercial List]) — considered

Lehndorff General Partner Ltd., Re (1993), 17 C.B.R. (3d) 24, 9 B.L.R. (2d) 275, 1993 CarswellOnt 183 (Ont. Gen. Div. [Commercial List]) — referred to

Muscletech Research & Development Inc., Re (2006), 19 C.B.R. (5th) 54, 2006 CarswellOnt 264 (Ont. S.C.J. [Commercial List]) — followed

Philip Services Corp., Re (1999), 13 C.B.R. (4th) 159, 1999 CarswellOnt 4673 (Ont. S.C.J. [Commercial List]) — considered

Sierra Club of Canada v. Canada (Minister of Finance) (2002), 287 N.R. 203, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 18 C.P.R. (4th) 1, 44 C.E.L.R. (N.S.) 161, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 211 D.L.R. (4th) 193, 223 F.T.R. 137 (note), 20 C.P.C. (5th) 1, 40 Admin. L.R. (3d) 1, 2002 SCC 41, 2002 CarswellNat 822, 2002 CarswellNat 823, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 93 C.R.R. (2d) 219, [2002] 2 S.C.R. 522 (S.C.C.) — followed

Statutes considered:

***Companies' Creditors** Arrangement Act*, R.S.C. 1985, c. C-36

Generally — referred to

s. 4 — considered

s. 5 — considered

s. 11.2 [en. 1997, c. 12, s. 124] — considered

s. 11.2(1) [en. 1997, c. 12, s. 124] — considered

s. 11.2(4) [en. 1997, c. 12, s. 124] — considered

s. 11.4 [en. 1997, c. 12, s. 124] — considered

s. 11.4(1) [en. 1997, c. 12, s. 124] — considered

s. 11.4(2) [en. 1997, c. 12, s. 124] — considered

s. 11.7(2) [en. 1997, c. 12, s. 124] — referred to

s. 11.51 [en. 2005, c. 47, s. 128] — considered

s. 11.52 [en. 2005, c. 47, s. 128] — considered

Courts of Justice Act, R.S.O. 1990, c. C.43

s. 137(2) — considered

***Pepall J.*:**

Reasons for Decision

Introduction

1 Canwest Global Communications Corp. ("Canwest Global") is a leading Canadian media company with interests in (i) newspaper publishing and digital media; and (ii) free-to-air television stations and subscription based specialty television channels. Canwest Global, the entities in its Canadian television business (excluding CW Investments Co. and its subsidiaries) and the National Post Company (which prior to October 30, 2009 owned and published the National Post) (collectively, the "CMI Entities"), obtained protection from their creditors in a *Companies' Creditors Arrangement Act*[FN1] ("CCAA") proceeding on October 6, 2009.[FN2] Now, the Canwest Global Canadian newspaper entities with the exception of National Post Inc. seek similar protection. Specifically, Canwest Publishing Inc./Publications Canwest Inc. ("CPI"), Canwest Books Inc. ("CBI"), and Canwest (Canada) Inc. ("CCI") apply for an order pursuant to the CCAA. They also seek to have the stay of proceedings and the other benefits of the order extend to Canwest Limited Partnership/ Canwest Société en Commandite (the "Limited Partnership"). The Applicants and the Limited Partnership are referred to as the "LP Entities" throughout these reasons. The term "Canwest" will be used to refer to the Canwest enterprise as a whole. It includes the LP Entities and Canwest Global's other subsidiaries which are not applicants in this proceeding.

2 All appearing on this application supported the relief requested with the exception of the Ad Hoc Committee of 9.25% Senior Subordinated Noteholders. That Committee represents certain unsecured creditors whom I will discuss more fully later.

3 I granted the order requested with reasons to follow. These are my reasons.

4 I start with three observations. Firstly, Canwest Global, through its ownership interests in

the LP Entities, is the largest publisher of daily English language newspapers in Canada. The LP Entities own and operate 12 daily newspapers across Canada. These newspapers are part of the Canadian heritage and landscape. The oldest, The Gazette, was established in Montreal in 1778. The others are the Vancouver Sun, The Province, the Ottawa Citizen, the Edmonton Journal, the Calgary Herald, The Windsor Star, the Times Colonist, The Star Phoenix, the Leader-Post, the Nanaimo Daily News and the Alberni Valley Times. These newspapers have an estimated average weekly readership that exceeds 4 million. The LP Entities also publish 23 non-daily newspapers and own and operate a number of digital media and online operations. The community served by the LP Entities is huge. In addition, based on August 31, 2009 figures, the LP Entities employ approximately 5,300 employees in Canada with approximately 1,300 of those employees working in Ontario. The granting of the order requested is premised on an anticipated going concern sale of the newspaper business of the LP Entities. This serves not just the interests of the LP Entities and their stakeholders but the Canadian community at large.

5 Secondly, the order requested may contain some shortcomings; it may not be perfect. That said, insolvency proceedings typically involve what is feasible, not what is flawless.

6 Lastly, although the builders of this insolvent business are no doubt unhappy with its fate, gratitude is not misplaced by acknowledging their role in its construction.

Background Facts

(i) Financial Difficulties

7 The LP Entities generate the majority of their revenues through the sale of advertising. In the fiscal year ended August 31, 2009, approximately 72% of the LP Entities' consolidated revenue derived from advertising. The LP Entities have been seriously affected by the economic downturn in Canada and their consolidated advertising revenues declined substantially in the latter half of 2008 and in 2009. In addition, they experienced increases in certain of their operating costs.

8 On May 29, 2009 the Limited Partnership failed, for the first time, to make certain interest and principal reduction payments and related interest and cross currency swap payments totaling approximately $10 million in respect of its senior secured credit facilities. On the same day, the Limited Partnership announced that, as of May 31, 2009, it would be in breach of certain financial covenants set out in the credit agreement dated as of July 10, 2007 between its predecessor, Canwest Media Works Limited Partnership, The Bank of Nova Scotia as administrative agent, a syndicate of secured lenders ("the LP Secured Lenders"), and the predecessors of CCI, CPI and CBI as guarantors. The Limited Partnership also failed to make principal, interest and fee payments due pursuant to this credit agreement on June 21, June 22, July 21, July 22 and August 21, 2009.

9 The May 29, 2009, defaults under the senior secured credit facilities triggered defaults in

respect of related foreign currency and interest rate swaps. The swap counterparties (the "Hedging Secured Creditors") demanded payment of $68.9 million. These unpaid amounts rank pari passu with amounts owing under the LP Secured Lenders' credit facilities.

10 On or around August 31, 2009, the Limited Partnership and certain of the LP Secured Lenders entered into a forbearance agreement in order to allow the LP Entities and the LP Secured Lenders the opportunity to negotiate a pre-packaged restructuring or reorganization of the affairs of the LP Entities. On November 9, 2009, the forbearance agreement expired and since then, the LP Secured Lenders have been in a position to demand payment of approximately $953.4 million, the amount outstanding as at August 31, 2009. Nonetheless, they continued negotiations with the LP Entities. The culmination of this process is that the LP Entities are now seeking a stay of proceedings under the CCAA in order to provide them with the necessary "breathing space" to restructure and reorganize their businesses and to preserve their enterprise value for the ultimate benefit of their broader stakeholder community.

11 The Limited Partnership released its annual consolidated financial statements for the twelve months ended August 31, 2009 and 2008 on November 26, 2009. As at August 31, 2009, the Limited Partnership had total consolidated assets with a net book value of approximately $644.9 million. This included consolidated current assets of $182.7 million and consolidated non-current assets of approximately $462.2 million. As at that date, the Limited Partnership had total consolidated liabilities of approximately $1.719 billion (increased from $1.656 billion as at August 31, 2008). These liabilities consisted of consolidated current liabilities of $1.612 billion and consolidated non-current liabilities of $107 million.

12 The Limited Partnership had been experiencing deteriorating financial results over the past year. For the year ended August 31, 2009, the Limited Partnership's consolidated revenues decreased by $181.7 million or 15% to $1.021 billion as compared to $1.203 billion for the year ended August 31, 2008. For the year ended August 31, 2009, the Limited Partnership reported a consolidated net loss of $66 million compared to consolidated net earnings of $143.5 million for fiscal 2008.

(ii) Indebtedness under the Credit Facilities

13 The indebtedness under the credit facilities of the LP Entities consists of the following.

(a) The LP senior secured credit facilities are the subject matter of the July 10, 2007 credit agreement already mentioned. They are guaranteed by CCI, CPI and CBI. The security held by the LP Secured Lenders has been reviewed by the solicitors for the proposed Monitor, FTI Consulting Canada Inc. and considered to be valid and enforceable.[FN3] As at August 31, 2009, the amounts owing by the LP Entities totaled $953.4 million exclusive of interest.[FN4]

(b) The Limited Partnership is a party to the aforementioned foreign currency and interest

rate swaps with the Hedging Secured Creditors. Defaults under the LP senior secured credit facilities have triggered defaults in respect of these swap arrangements. Demand for repayment of amounts totaling $68.9 million (exclusive of unpaid interest) has been made. These obligations are secured.

(c) Pursuant to a senior subordinated credit agreement dated as of July 10, 2007, between the Limited Partnership, The Bank of Nova Scotia as administrative agent for a syndicate of lenders, and others, certain subordinated lenders agreed to provide the Limited Partnership with access to a term credit facility of up to $75 million. CCI, CPI, and CBI are guarantors. This facility is unsecured, guaranteed on an unsecured basis and currently fully drawn. On June 20, 2009, the Limited Partnership failed to make an interest payment resulting in an event of default under the credit agreement. In addition, the defaults under the senior secured credit facilities resulted in a default under this facility. The senior subordinated lenders are in a position to take steps to demand payment.

(d) Pursuant to a note indenture between the Limited Partnership, The Bank of New York Trust Company of Canada as trustee, and others, the Limited Partnership issued 9.5% per annum senior subordinated unsecured notes due 2015 in the aggregate principal amount of US $400 million. CPI and CBI are guarantors. The notes are unsecured and guaranteed on an unsecured basis. The noteholders are in a position to take steps to demand immediate payment of all amounts outstanding under the notes as a result of events of default.

14 The LP Entities use a centralized cash management system at the Bank of Nova Scotia which they propose to continue. Obligations owed pursuant to the existing cash management arrangements are secured (the "Cash Management Creditor").

(iii) LP Entities' Response to Financial Difficulties

15 The LP Entities took a number of steps to address their circumstances with a view to improving cash flow and strengthening their balance sheet. Nonetheless, they began to experience significant tightening of credit from critical suppliers and other trade creditors. The LP Entities' debt totals approximately $1.45 billion and they do not have the liquidity required to make payment in respect of this indebtedness. They are clearly insolvent.

16 The board of directors of Canwest Global struck a special committee of directors (the "Special Committee") with a mandate to explore and consider strategic alternatives. The Special Committee has appointed Thomas Strike, the President, Corporate Development & Strategy Implementation, as Recapitalization Officer and has retained Gary Colter of CRS Inc. as Restructuring Advisor for the LP Entities (the "CRA"). The President of CPI, Dennis Skulsky, will report directly to the Special Committee.

17 Given their problems, throughout the summer and fall of 2009, the LP Entities have participated in difficult and complex negotiations with their lenders and other stakeholders to obtain

forbearance and to work towards a consensual restructuring or recapitalization.

18 An ad hoc committee of the holders of the senior subordinated unsecured notes (the "Ad Hoc Committee") was formed in July, 2009 and retained Davies Ward Phillips & Vineberg as counsel. Among other things, the Limited Partnership agreed to pay the Committee's legal fees up to a maximum of $250,000. Representatives of the Limited Partnership and their advisors have had ongoing discussions with representatives of the Ad Hoc Committee and their counsel was granted access to certain confidential information following execution of a confidentiality agreement. The Ad Hoc Committee has also engaged a financial advisor who has been granted access to the LP Entities' virtual data room which contains confidential information regarding the business and affairs of the LP Entities. There is no evidence of any satisfactory proposal having been made by the noteholders. They have been in a position to demand payment since August, 2009, but they have not done so.

19 In the meantime and in order to permit the businesses of the LP Entities to continue to operate as going concerns and in an effort to preserve the greatest number of jobs and maximize value for the stakeholders of the LP Entities, the LP Entities have been engaged in negotiations with the LP Senior Lenders, the result of which is this CCAA application.

(iv) The Support Agreement, the Secured Creditors' Plan and the Solicitation Process

20 Since August 31, 2009, the LP Entities and the LP administrative agent for the LP Secured Lenders have worked together to negotiate terms for a consensual, prearranged restructuring, recapitalization or reorganization of the business and affairs of the LP Entities as a going concern. This is referred to by the parties as the Support Transaction.

21 As part of this Support Transaction, the LP Entities are seeking approval of a Support Agreement entered into by them and the administrative agent for the LP Secured Lenders. 48% of the LP Secured Lenders, the Hedging Secured Creditors, and the Cash Management Creditor (the "Secured Creditors") are party to the Support Agreement.

22 Three interrelated elements are contemplated by the Support Agreement and the Support Transaction: the credit acquisition, the Secured Creditors' plan (the "Plan"), and the sale and investor solicitation process which the parties refer to as SISP.

23 The Support Agreement contains various milestones with which the LP Entities are to comply and, subject to a successful bid arising from the solicitation process (an important caveat in my view), commits them to support a credit acquisition. The credit acquisition involves an acquisition by an entity capitalized by the Secured Creditors and described as AcquireCo. AcquireCo. would acquire substantially all of the assets of the LP Entities (including the shares in National Post Inc.) and assume certain of the liabilities of the LP Entities. It is contemplated that AcquireCo. would offer employment to all or substantially all of the employees of the LP Entities and would assume all of the LP Entities' existing pension plans and existing post-retirement

and post-employment benefit plans subject to a right by AcquireCo., acting commercially reasonably and after consultation with the operational management of the LP Entities, to exclude certain specified liabilities. The credit acquisition would be the subject matter of a Plan to be voted on by the Secured Creditors on or before January 31, 2010. There would only be one class. The Plan would only compromise the LP Entities' secured claims and would not affect or compromise any other claims against any of the LP Entities ("unaffected claims"). No holders of the unaffected claims would be entitled to vote on or receive any distributions of their claims. The Secured Creditors would exchange their outstanding secured claims against the LP Entities under the LP credit agreement and the swap obligations respectively for their *pro rata* shares of the debt and equity to be issued by AcquireCo. All of the LP Entities' obligations under the LP secured claims calculated as of the date of closing less $25 million would be deemed to be satisfied following the closing of the Acquisition Agreement. LP secured claims in the amount of $25 million would continue to be held by AcquireCo. and constitute an outstanding unsecured claim against the LP Entities.

24 The Support Agreement contemplates that the Financial Advisor, namely RBC Dominion Securities Inc., under the supervision of the Monitor, will conduct the solicitation process. Completion of the credit acquisition process is subject to a successful bid arising from the solicitation process. In general terms, the objective of the solicitation process is to obtain a better offer (with some limitations described below) than that reflected in the credit acquisition. If none is obtained in that process, the LP Entities intend for the credit acquisition to proceed assuming approval of the Plan. Court sanction would also be required.

25 In more detailed terms, Phase I of the solicitation process is expected to last approximately 7 weeks and qualified interested parties may submit non-binding proposals to the Financial Advisor on or before February 26, 2010. Thereafter, the Monitor will assess the proposals to determine whether there is a reasonable prospect of obtaining a Superior Offer. This is in essence a cash offer that is equal to or higher than that represented by the credit acquisition. If there is such a prospect, the Monitor will recommend that the process continue into Phase II. If there is no such prospect, the Monitor will then determine whether there is a Superior Alternative Offer, that is, an offer that is not a Superior Offer but which might nonetheless receive approval from the Secured Creditors. If so, to proceed into Phase II, the Superior Alternative Offer must be supported by Secured Creditors holding more than at least 33.3% of the secured claims. If it is not so supported, the process would be terminated and the LP Entities would then apply for court sanction of the Plan.

26 Phase II is expected to last approximately 7 weeks as well. This period allows for due diligence and the submission of final binding proposals. The Monitor will then conduct an assessment akin to the Phase 1 process with somewhat similar attendant outcomes if there are no Superior Offers and no acceptable Alternative Superior Offers. If there were a Superior Offer or an acceptable Alternative Superior Offer, an agreement would be negotiated and the requisite approvals sought.

27 The solicitation process is designed to allow the LP Entities to test the market. One concern is that a Superior Offer that benefits the secured lenders might operate to preclude a Superior Alternative Offer that could provide a better result for the unsecured creditors. That said, the LP Entities are of the view that the solicitation process and the support transaction present the best opportunity for the businesses of the LP Entities to continue as going concerns, thereby preserving jobs as well as the economic and social benefits of their continued operation. At this stage, the alternative is a bankruptcy or liquidation which would result in significant detriment not only to the creditors and employees of the LP Entities but to the broader community that benefits from the continued operation of the LP Entities' business. I also take some comfort from the position of the Monitor which is best captured in an excerpt from its preliminary Report:

> The terms of the Support Agreement and SISP were the subject of lengthy and intense arm's length negotiations between the LP Entities and the LP Administrative Agent. The Proposed Monitor supports approval of the process contemplated therein and of the approval of those documents, but without in any way fettering the various powers and discretions of the Monitor.

28 It goes without saying that the Monitor, being a court appointed officer, may apply to the court for advice and directions and also owes reporting obligations to the court.

29 As to the objection of the Ad Hoc Committee, I make the following observations. Firstly, they represent unsecured subordinated debt. They have been in a position to take action since August, 2009. Furthermore, the LP Entities have provided up to $250,000 for them to retain legal counsel. Meanwhile, the LP Secured Lenders have been in a position to enforce their rights through a non-consensual court proceeding and have advised the LP Entities of their abilities in that regard in the event that the LP Entities did not move forward as contemplated by the Support Agreement. With the Support Agreement and the solicitation process, there is an enhanced likelihood of the continuation of going concern operations, the preservation of jobs and the maximization of value for stakeholders of the LP Entities. It seemed to me that in the face of these facts and given that the Support Agreement expired on January 8, 2010, adjourning the proceeding was not merited in the circumstances. The Committee did receive very short notice. Without being taken as encouraging or discouraging the use of the comeback clause in the order, I disagree with the submission of counsel to the Ad Hoc Committee to the effect that it is very difficult if not impossible to stop a process relying on that provision. That provision in the order is a meaningful one as is clear from the decision in *Muscletech Research & Development Inc., Re*[FN5]. On a come back motion, although the positions of parties who have relied bona fide on an Initial Order should not be prejudiced, the onus is on the applicants for an Initial Order to satisfy the court that the existing terms should be upheld.

Proposed Monitor

30 The Applicants propose that FTI Consulting Canada Inc. serve as the Monitor. It currently serves as the Monitor in the CMI Entities' CCAA proceeding. It is desirable for FTI to act;

it is qualified to act; and it has consented to act. It has not served in any of the incompatible capacities described in section 11.7(2) of the CCAA. The proposed Monitor has an enhanced role that is reflected in the order and which is acceptable.

Proposed Order

31 As mentioned, I granted the order requested. It is clear that the LP Entities need protection under the CCAA. The order requested will provide stability and enable the LP Entities to pursue their restructuring and preserve enterprise value for their stakeholders. Without the benefit of a stay, the LP Entities would be required to pay approximately $1.45 billion and would be unable to continue operating their businesses.

(a) Threshold Issues

32 The chief place of business of the Applicants is Ontario. They qualify as debtor companies under the CCAA. They are affiliated companies with total claims against them that far exceed $5 million. Demand for payment of the swap indebtedness has been made and the Applicants are in default under all of the other facilities outlined in these reasons. They do not have sufficient liquidity to satisfy their obligations. They are clearly insolvent.

(b) Limited Partnership

33 The Applicants seek to extend the stay of proceedings and the other relief requested to the Limited Partnership. The CCAA definition of a company does not include a partnership or a limited partnership but courts have exercised their inherent jurisdiction to extend the protections of an Initial CCAA Order to partnerships when it was just and convenient to do so. The relief has been held to be appropriate where the operations of the partnership are so intertwined with those of the debtor companies that irreparable harm would ensue if the requested stay were not granted: *Canwest Global Communications Corp., Re*[FN6]and *Lehndorff General Partner Ltd., Re*[FN7].

34 In this case, the Limited Partnership is the administrative backbone of the LP Entities and is integral to and intertwined with the Applicants' ongoing operations. It owns all shared information technology assets; it provides hosting services for all Canwest properties; it holds all software licences used by the LP Entities; it is party to many of the shared services agreements involving other Canwest entities; and employs approximately 390 full-time equivalent employees who work in Canwest's shared services area. The Applicants state that failure to extend the stay to the Limited Partnership would have a profoundly negative impact on the value of the Applicants, the Limited Partnership and the Canwest Global enterprise as a whole. In addition, exposing the assets of the Limited Partnership to the demands of creditors would make it impossible for the LP Entities to successfully restructure. I am persuaded that under these circumstances it is just and convenient to grant the request.

(c) Filing of the Secured Creditors' Plan

35 The LP Entities propose to present the Plan only to the Secured Creditors. Claims of unsecured creditors will not be addressed.

36 The CCAA seems to contemplate a single creditor-class plan. Sections 4 and 5 state:

> s.4 Where a compromise or an arrangement is proposed between a debtor company and its unsecured creditors or any class of them, the court may, on the application in a summary way of the company or of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors and, it the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.
>
> s.5 Where a compromise or an arrangement is proposed between a debtor company and its secured creditors or any class of them, the court may, on the application in a summary way of the company or of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.

37 Case law has interpreted these provisions as authorizing a single creditor-class plan. For instance, Blair J. (as he then was) stated in *Philip Services Corp., Re*[FN8] : " There is no doubt that a debtor is at liberty, under the terms of sections 4 and 5 of the CCAA, to make a proposal to secured creditors or to unsecured creditors or to both groups."[FN9] Similarly, in *Anvil Range Mining Corp., Re*[FN10], the Court of Appeal stated: "It may also be noted that s. 5 of the CCAA contemplates a plan which is a compromise between a debtor company and its secured creditors and that by the terms of s. 6 of the Act, applied to the facts of this case, the plan is binding only on the secured creditors and the company and not on the unsecured creditors."[FN11]

38 Based on the foregoing, it is clear that a debtor has the statutory authority to present a plan to a single class of creditors. In *Anvil Range Mining Corp., Re*, the issue was raised in the context of the plan's sanction by the court and a consideration of whether the plan was fair and reasonable as it eliminated the opportunity for unsecured creditors to realize anything. The basis of the argument was that the motions judge had erred in not requiring a more complete and in depth valuation of the company's assets relative to the claims of the secured creditors.

39 In this case, I am not being asked to sanction the Plan at this stage. Furthermore, the Monitor will supervise a vigorous and lengthy solicitation process to thoroughly canvass the market for alternative transactions. The solicitation should provide a good indication of market value. In addition, as counsel for the LP Entities observed, the noteholders and the LP Entities never had any forbearance agreement. The noteholders have been in a position to take action since last summer but chose not to do so. One would expect some action on their part if they themselves believed that they "were in the money". While the process is not perfect, it is subject to the supervision of the court and the Monitor is obliged to report on its results to the court.

40 In my view it is appropriate in the circumstances to authorize the LP Entities to file and present a Plan only to the Secured Creditors.

(D) DIP Financing

41 The Applicants seek approval of a DIP facility in the amount of $25 million which would be secured by a charge over all of the assets of the LP Entities and rank ahead of all other charges except the Administration Charge, and ahead of all other existing security interests except validly perfected purchase money security interests and certain specific statutory encumbrances.

42 Section 11.2 of the CCAA provides the statutory jurisdiction to grant a DIP charge. In *Canwest Global Communications Corp., Re*[FN12], I addressed this provision. Firstly, an applicant should address the requirements contained in section 11.2 (1) and then address the enumerated factors found in section 11.2(4) of the CCAA. As that list is not exhaustive, it may be appropriate to consider other factors as well.

43 Applying these principles to this case and dealing firstly with section 11.2(1) of the CCAA, notice either has been given to secured creditors likely to be affected by the security or charge or alternatively they are not affected by the DIP charge. While funds are not anticipated to be immediately necessary, the cash flow statements project a good likelihood that the LP Entities will require the additional liquidity afforded by the $25 million. The ability to borrow funds that are secured by a charge will help retain the confidence of the LP Entities' trade creditors, employees and suppliers. It is expected that the DIP facility will permit the LP Entities to conduct the solicitation process and consummate a recapitalization transaction of a sale of all or some of its assets. The charge does not secure any amounts that were owing prior to the filing. As such, there has been compliance with the provisions of section 11.2 (1).

44 Turning then to a consideration of the factors found in section 11.2(4) of the Act, the LP Entities are expected to be subject to these CCAA proceedings until July 31, 2010. Their business and financial affairs will be amply managed during the proceedings. This is a consensual filing which is reflective of the confidence of the major creditors in the current management configuration. All of these factors favour the granting of the charge. The DIP loan would enhance the prospects of a viable compromise or arrangement and would ensure the necessary stability during the CCAA process. I have already touched upon the issue of value. That said, in relative terms, the quantum of the DIP financing is not large and there is no readily apparent material prejudice to any creditor arising from the granting of the charge and approval of the financing. I also note that it is endorsed by the proposed Monitor in its report.

45 Other factors to consider in assessing whether to approve a DIP charge include the reasonableness of the financing terms and more particularly the associated fees. Ideally there should be some evidence on this issue. Prior to entering into the forbearance agreement, the LP Entities

sought proposals from other third party lenders for a DIP facility. In this case, some but not all of the Secured Creditors are participating in the financing of the DIP loan. Therefore, only some would benefit from the DIP while others could bear the burden of it. While they may have opted not to participate in the DIP financing for various reasons, the concurrence of the non participating Secured Creditors is some market indicator of the appropriateness of the terms of the DIP financing.

46 Lastly, I note that the DIP lenders have indicated that they would not provide a DIP facility if the charge was not approved. In all of these circumstances, I was prepared to approve the DIP facility and grant the DIP charge.

(e) Critical Suppliers

47 The LP Entities ask that they be authorized but not required to pay pre-filing amounts owing in arrears to certain suppliers if the supplier is critical to the business and ongoing operations of the LP Entities or the potential future benefit of the payments is considerable and of value to the LP Entities as a whole. Such payments could only be made with the consent of the proposed Monitor. At present, it is contemplated that such suppliers would consist of certain newspaper suppliers, newspaper distributors, logistic suppliers and the Amex Bank of Canada. The LP Entities do not seek a charge to secure payments to any of its critical suppliers.

48 Section 11.4 of the CCAA addresses critical suppliers. It states:

> 11.4(1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring a person to be a critical supplier to the company if the court is satisfied that the person is a supplier of goods and services to the company and that the goods or services that are supplied are critical to the company's continued operation.
>
> (2) If the court declares the person to be a critical supplier, the court may make an order requiring the person to supply any goods or services specified by the court to the company on any terms and conditions that are consistent with the supply relationship or that the court considers appropriate.
>
> (3) If the court makes an order under subsection (2), the court shall, in the order, declare that all or part of the property of the company is subject to a security or charge in favour of the person declared to be a critical supplier, in an amount equal to the value of the goods or services supplied upon the terms of the order.
>
> (4) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

49 Mr. Byers, who is counsel for the Monitor, submits that the court has always had discre-

tion to authorize the payment of critical suppliers and that section 11.4 is not intended to address that issue. Rather, it is intended to respond to a post-filing situation where a debtor company wishes to compel a supplier to supply. In those circumstances, the court may declare a person to be a critical supplier and require the person to supply. If the court chooses to compel a person to supply, it must authorize a charge as security for the supplier. Mr. Barnes, who is counsel for the LP Entities, submits that section 11.4 is not so limited. Section 11.4 (1) gives the court general jurisdiction to declare a supplier to be a "critical supplier" where the supplier provides goods or services that are essential to the ongoing business of the debtor company. The permissive as opposed to mandatory language of section 11.4 (2) supports this interpretation.

50 Section 11.4 is not very clear. As a matter of principle, one would expect the purpose of section 11.4 to be twofold: (i) to codify the authority to permit suppliers who are critical to the continued operation of the company to be paid and (ii) to require the granting of a charge in circumstances where the court is compelling a person to supply. If no charge is proposed to be granted, there is no need to give notice to the secured creditors. I am not certain that the distinction between Mr. Byers and Mr. Barnes' interpretation is of any real significance for the purposes of this case. Either section 11.4(1) does not oust the court's inherent jurisdiction to make provision for the payment of critical suppliers where no charge is requested or it provides authority to the court to declare persons to be critical suppliers. Section 11.4(1) requires the person to be a supplier of goods and services that are critical to the companies' operation but does not impose any additional conditions or limitations.

51 The LP Entities do not seek a charge but ask that they be authorized but not required to make payments for the pre-filing provision of goods and services to certain third parties who are critical and integral to their businesses. This includes newsprint and ink suppliers. The LP Entities are dependent upon a continuous and uninterrupted supply of newsprint and ink and they have insufficient inventory on hand to meet their needs. It also includes newspaper distributors who are required to distribute the newspapers of the LP Entities; American Express whose corporate card programme and accounts are used by LP Entities employees for business related expenses; and royalty fees accrued and owing to content providers for the subscription-based online service provided by FPinfomart.ca, one of the businesses of the LP Entities. The LP Entities believe that it would be damaging to both their ongoing operations and their ability to restructure if they are unable to pay their critical suppliers. I am satisfied that the LP Entities may treat these parties and those described in Mr. Strike's affidavit as critical suppliers but none will be paid without the consent of the Monitor.

(f) Administration Charge and Financial Advisor Charge

52 The Applicants also seek a charge in the amount of $3 million to secure the fees of the Monitor, its counsel, the LP Entities' counsel, the Special Committee's financial advisor and counsel to the Special Committee, the CRA and counsel to the CRA. These are professionals whose services are critical to the successful restructuring of the LP Entities' business. This charge is to rank in priority to all other security interests in the LP Entities' assets, with the ex-

ception of purchase money security interests and specific statutory encumbrances as provided for in the proposed order.[FN13] The LP Entities also request a $10 million charge in favour of the Financial Advisor, RBC Dominion Securities Inc. The Financial Advisor is providing investment banking services to the LP Entities and is essential to the solicitation process. This charge would rank in third place, subsequent to the administration charge and the DIP charge.

53 In the past, an administration charge was granted pursuant to the inherent jurisdiction of the court. Section 11.52 of the amended CCAA now provides statutory jurisdiction to grant an administration charge. Section 11.52 states:

On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of the debtor company is subject to a security or charge - in an amount that the court considers appropriate - in respect of the fees and expenses of

(a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;

(b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and

(c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

54 I am satisfied that the issue of notice has been appropriately addressed by the LP Entities. As to whether the amounts are appropriate and whether the charges should extend to the proposed beneficiaries, the section does not contain any specific criteria for a court to consider in its assessment. It seems to me that factors that might be considered would include:

(a) the size and complexity of the businesses being restructured;

(b) the proposed role of the beneficiaries of the charge;

(c) whether there is an unwarranted duplication of roles;

(d) whether the quantum of the proposed charge appears to be fair and reasonable;

(e) the position of the secured creditors likely to be affected by the charge; and

(f) the position of the Monitor.

This is not an exhaustive list and no doubt other relevant factors will be developed in the jurisprudence.

55 There is no question that the restructuring of the LP Entities is large and highly complex and it is reasonable to expect extensive involvement by professional advisors. Each of the professionals whose fees are to be secured has played a critical role in the LP Entities restructuring activities to date and each will continue to be integral to the solicitation and restructuring process. Furthermore, there is no unwarranted duplication of roles. As to quantum of both proposed charges, I accept the Applicants' submissions that the business of the LP Entities and the tasks associated with their restructuring are of a magnitude and complexity that justify the amounts. I also take some comfort from the fact that the administrative agent for the LP Secured Lenders has agreed to them. In addition, the Monitor supports the charges requested. The quantum of the administration charge appears to be fair and reasonable. As to the quantum of the charge in favour of the Financial Advisor, it is more unusual as it involves an incentive payment but I note that the Monitor conducted its own due diligence and, as mentioned, is supportive of the request. The quantum reflects an appropriate incentive to secure a desirable alternative offer. Based on all of these factors, I concluded that the two charges should be approved.

(g) Directors and Officers

56 The Applicants also seek a directors and officers charge ("D & O charge") in the amount of $35 million as security for their indemnification obligations for liabilities imposed upon the Applicants' directors and officers. The D & O charge will rank after the Financial Advisor charge and will rank pari passu with the MIP charge discussed subsequently. Section 11.51 of the CCAA addresses a D & O charge. I have already discussed section 11.51 in *Canwest Global Communications Corp., Re*[FN14] as it related to the request by the CMI Entities for a D & O charge. Firstly, the charge is essential to the successful restructuring of the LP Entities. The continued participation of the experienced Boards of Directors, management and employees of the LP Entities is critical to the restructuring. Retaining the current officers and directors will also avoid destabilization. Furthermore, a CCAA restructuring creates new risks and potential liabilities for the directors and officers. The amount of the charge appears to be appropriate in light of the obligations and liabilities that may be incurred by the directors and officers. The charge will not cover all of the directors' and officers' liabilities in a worse case scenario. While Canwest Global maintains D & O liability insurance, it has only been extended to February 28, 2009 and further extensions are unavailable. As of the date of the Initial Order, Canwest Global had been unable to obtain additional or replacement insurance coverage.

57 Understandably in my view, the directors have indicated that due to the potential for significant personal liability, they cannot continue their service and involvement in the restructuring absent a D & O charge. The charge also provides assurances to the employees of the LP Entities that obligations for accrued wages and termination and severance pay will be satisfied. All se-

cured creditors have either been given notice or are unaffected by the D & O charge. Lastly, the Monitor supports the charge and I was satisfied that the charge should be granted as requested.

(h) Management Incentive Plan and Special Arrangements

58 The LP Entities have made amendments to employment agreements with 2 key employees and have developed certain Management Incentive Plans for 24 participants (collectively the "MIPs"). They seek a charge in the amount of $3 million to secure these obligations. It would be subsequent to the D & O charge.

59 The CCAA is silent on charges in support of Key Employee Retention Plans ("KERPs") but they have been approved in numerous CCAA proceedings. Most recently, in *Canwest Global Communications Corp., Re*[FN15], I approved the KERP requested on the basis of the factors enumerated in *Grant Forest Products Inc., Re*[FN16] and given that the Monitor had carefully reviewed the charge and was supportive of the request as were the Board of Directors, the Special Committee of the Board of Directors, the Human Resources Committee of Canwest Global and the Adhoc Committee of Noteholders.

60 The MIPs in this case are designed to facilitate and encourage the continued participation of certain senior executives and other key employees who are required to guide the LP Entities through a successful restructuring. The participants are critical to the successful restructuring of the LP Entities. They are experienced executives and have played critical roles in the restructuring initiatives to date. They are integral to the continued operation of the business during the restructuring and the successful completion of a plan of restructuring, reorganization, compromise or arrangement.

61 In addition, it is probable that they would consider other employment opportunities in the absence of a charge securing their payments. The departure of senior management would distract from and undermine the restructuring process that is underway and it would be extremely difficult to find replacements for these employees. The MIPs provide appropriate incentives for the participants to remain in their current positions and ensures that they are properly compensated for their assistance in the reorganization process.

62 In this case, the MIPs and the MIP charge have been approved in form and substance by the Board of Directors and the Special Committee of Canwest Global. The proposed Monitor has also expressed its support for the MIPs and the MIP charge in its pre-filing report. In my view, the charge should be granted as requested.

(i) Confidential Information

63 The LP Entities request that the court seal the confidential supplement which contains individually identifiable information and compensation information including sensitive salary information about the individuals who are covered by the MIPs. It also contains an unredacted

copy of the Financial Advisor's agreement. I have discretion pursuant to Section 137(2) of the *Courts of Justice Act*[FN17] to order that any document filed in a civil proceeding be treated as confidential, sealed and not form part of the public record. That said, public access in an important tenet of our system of justice.

64 The threshold test for sealing orders is found in the Supreme Court of Canada decision of *Sierra Club of Canada v. Canada (Minister of Finance)*[FN18]. In that case, Iacobucci J. stated that an order should only be granted when: (i) it is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonable alternative measures will not prevent the risk; and (ii) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

65 In *Canwest Global Communications Corp., Re*[FN19] I applied the *Sierra Club* test and approved a similar request by the Applicants for the sealing of a confidential supplement containing unredacted copies of KERPs for the employees of the CMI Entities. Here, with respect to the first branch of the *Sierra Club* test, the confidential supplement contains unredacted copies of the MIPs. Protecting the disclosure of sensitive personal and compensation information of this nature, the disclosure of which would cause harm to both the LP Entities and the MIP participants, is an important commercial interest that should be protected. The information would be of obvious strategic advantage to competitors. Moreover, there are legitimate personal privacy concerns in issue. The MIP participants have a reasonable expectation that their names and their salary information will be kept confidential. With respect to the second branch of the *Sierra Club* test, keeping the information confidential will not have any deleterious effects. As in the *Canwest Global Communications Corp., Re* case, the aggregate amount of the MIP charge has been disclosed and the individual personal information adds nothing. The salutary effects of sealing the confidential supplement outweigh any conceivable deleterious effects. In the normal course, outside of the context of a CCAA proceeding, confidential personal and salary information would be kept confidential by an employer and would not find its way into the public domain. With respect to the unredacted Financial Advisor agreement, it contains commercially sensitive information the disclosure of which could be harmful to the solicitation process and the salutary effects of sealing it outweigh any deleterious effects. The confidential supplements should be sealed and not form part of the public record at least at this stage of the proceedings.

Conclusion

66 For all of these reasons, I was prepared to grant the order requested.

FN1 R.S.C. 1985, c. C. 36, as amended.

FN2 On October 30, 2009, substantially all of the assets and business of the National Post Company were transferred to the company now known as National Post Inc.

FN3 Subject to certain assumptions and qualifications.

FN4 Although not formally in evidence before the court, counsel for the LP Secured Lenders advised the court that currently $382,889,000 in principal in Canadian dollars is outstanding along with $458,042,000 in principal in American dollars.

FN52006 CarswellOnt 264 (Ont. S.C.J. [Commercial List]).

FN62009 CarswellOnt 6184 (Ont. S.C.J. [Commercial List]) at para. 29.

FN7(1993), 9 B.L.R. (2d) 275 (Ont. Gen. Div. [Commercial List]).

FN81999 CarswellOnt 4673 (Ont. S.C.J. [Commercial List]).

FN9 Ibid at para. 16.

FN10(2002), 34 C.B.R. (4th) 157 (Ont. C.A.), leave to appeal to S.C.C. refused (March 6,2003) [2003 CarswellOnt 730 (S.C.C.)].

FN11 Ibid at para. 34.

FN12 Supra, note 7 at paras. 31-35.

FN13 This exception also applies to the other charges granted.

FN14 Supra note 7 at paras. 44-48.

FN15 Supra note 7.

FN16[2009] O.J. No. 3344 (Ont. S.C.J. [Commercial List]).

FN17 R.S.O. 1990, c. C.43, as amended.

FN18[2002] 2 S.C.R. 522 (S.C.C.).

FN19 Supra, note 7 at para. 52.

END OF DOCUMENT

TAB 7

Personal Property Security Act, R.S.A. 2000, c. P-7

(Source: CanLII.org)

Disposal of collateral on default

60(1) Collateral may be disposed of in accordance with this Part in its existing condition or after any repair, processing or preparation for disposition, and the proceeds of the disposition shall be applied in the following order to

(a) the reasonable expenses of enforcing the security agreement, holding, repairing, processing or preparing for disposition and disposing of the collateral and any other reasonable expenses incurred by the secured party, and

(b) the satisfaction of the obligations secured by the security interest of the party disposing of the collateral,

and the surplus, if any, shall be dealt with in accordance with section 61.

...

(11) The secured party may purchase the collateral or any part of it only at a public sale and only for a price that bears a reasonable relationship to the market value of the collateral.

...

Retention of collateral

62(1) After default, the secured party may propose to take the collateral in satisfaction of the obligations secured, and shall give a notice of the proposal to

(a) the debtor or any other person who is known by the secured party to be the owner of the collateral,

(b) a creditor or person who has a security interest in the collateral whose interest is subordinate to that of the secured party, and

(i) who has, prior to the date that the notice of the proposal is given to the debtor, registered a financing statement according to the name of the debtor or according to the serial number of the collateral in the case of goods of a kind prescribed by the regulations as serial number goods, or

(ii) whose interest was perfected by possession at the time the collateral was seized,

(c) any other person with an interest in the collateral who has given a written notice to the secured party of an interest in the collateral prior to the date that notice is given to the debtor, and

(d) the civil enforcement agency, unless possession or seizure has been surrendered or released by the civil enforcement agency pursuant to section 58(5) or (7).

(2) If any person who is entitled to notification under subsection (1) and whose interest in the collateral would be adversely affected by the secured party's proposal gives to the secured party a written notice of objection not later than 15 days after

giving the notice under subsection (1), the secured party shall dispose of the collateral in accordance with section 60.

(3) If no notice of objection is given, the secured party is, at the expiry of the 15-day period referred to in subsection (2), deemed to have irrevocably elected to take the collateral in satisfaction of the obligation secured by it, and is entitled to hold or dispose of the collateral free from all rights and interest of the debtor and any person entitled to receive a notice

(a) under subsection (1)(b), and

(b) under subsection (1)(c) whose interest is subordinate to that of the secured party,

who has been given the notice and all obligations secured by the interests referred to in clauses (a) and (b) are deemed performed for the purposes of sections 49(7)(a) and 50(3)(a).

(4) The notice required under subsection (1) may be given in accordance with section 72 or, where notice is to be given to a person who has registered a financing statement, by registered mail addressed to the address of the person to whom it is to be given as it appears on the financing statement.

(5) The secured party may require any person who has made an objection to the secured party's proposal to furnish the secured party with proof of that person's interest in the collateral and, unless the person furnishes the proof not later than 10 days after the secured party's demand, the secured party may proceed as if the secured party had received no objection from that person.

(6) On application by a secured party, the Court may determine that an objection to the proposal of a secured party is ineffective on the grounds that

(a) the person made the objection for a purpose other than the protection of the person's interest in the collateral, or

(b) the market value of the collateral is less than the total amount owing to the secured party and the costs of disposition.

(7) Where a secured party disposes of the collateral to a purchaser who acquires the purchaser's interest for value and in good faith and who takes possession of it, the purchaser acquires the collateral free from

(a) the interest of the debtor,

(b) an interest subordinate to that of the debtor, and

(c) an interest subordinate to that of the secured party

whether or not the requirements of this section have been complied with by the secured party, and all obligations secured by the subordinate interests are deemed performed for the purposes of sections 49(7)(a) and 50(3)(a).

(8) Subsection (7) does not apply so as to affect the rights of a person with a security interest deemed to be registered under section 77 who has not been given a written notice under this section.

1988 cP-4.05 s62;1990 c31 s50;1991 c21 s29(10);1994 cC-10.5 s148

TAB 8

1984 CarswellAlta 72, 32 Alta. L.R. (2d) 1, [1984] 4 W.W.R. 587, 54 A.R. 172, 12 D.L.R. (4th) 161

1984 CarswellAlta 72

Canada Permanent Trust Co. v. King Art Developments Ltd.

CANADA PERMANENT TRUST COMPANY v. KING ART DEVELOPMENTS LTD. et al.

Alberta Court of Appeal

McGillivray C.J.A., Moir and Laycraft JJ.A.

Judgment: June 20, 1984
Docket: Edmonton Nos. 17085, 17196, 15851 & 15992

Counsel: *M. Trussler, B. Kenny* and *L. C. Hoyano*, for Canada Permanent Trust Co.

No one for King Art Developments Ltd.

E. Mirth and *S. McNaughtan*, for Arthur Klapstein, Johnny Barath and Owl Developments Ltd.

P. Warner and *D. N. McGuigan*, for Leslie and Attila Bagoly.

G. L. McLennan, for Zurich Investments Ltd. and Emil Drucker.

Subject: Corporate and Commercial; Civil Practice and Procedure

Mortgages --- Availability of concurrent remedies — On mortgage and guarantee.

Mortgages --- Sale — Judicial sale — Who may bid or purchase — Mortgagee.

Practice --- Pleadings — Amendment — Grounds for amendment — To alter or add to claim for relief — General.

Mortgages — Sale — Sale by court — Method and conduct of sale — Court permitted to grant "Rice" order selling property to mortgagee on basis of proposal put forth by mortgagee — Mortgagee also permitted to bid on judicial sale — Court having discretion to set value of property as market value or forced sale value in accepting proposal or tender.

Mortgages — Action on the covenant — Enforcement of covenant — Statutory conditions precedent: prior realization of security — Corporate mortgagor liable for deficiency after mortgagee purchasing property by tender at judicial sale or by proposal put before court — Debt extinguished only when mortgagee acquiring property by foreclosure — Mortgagee entitled to proceed on collateral obligations and mortgage in any order — Court having discretion to stay judgment on collateral security pending sale of land — No rule of law requiring stay.

Mortgages — Rights and remedies generally — Interest — Judgment on mortgage bearing interest at five per cent under s. 13 of Interest Act — Parties to mortgage not able to contract out of Interest Act.

1984 CarswellAlta 72, 32 Alta. L.R. (2d) 1, [1984] 4 W.W.R. 587, 54 A.R. 172, 12 D.L.R. (4th) 161

Rules considered:

Alberta Rules of Court, 1914, RR. 691, 692.

Alberta Rules of Court, 1944, R. 577.

Alberta Rules of Court, RR. 495-498, 689-691, Pt. 49.

Authorities considered:

Appraisal Institute of Canada.Bacon, Essay on Usury.Black's Law Dictionary, 4th ed. (1968), "satisfaction".Falconbridge on Mortgages.Robbins, Treatise on the Law of Mortgages (1897), pp. 903-907, 962, 963, 1016.Rowlatt on the Law of Principal and Surety, 4th ed. (1982), p. 92.Turner, R.W., "An English View of Mortgage Deficiency Judgments" (1935), 21 Virginia L. Rev. 600, pp. 603, 604, 605.Washburn, R.M., "The Judicial Legislative Response to Price Inadequacy in Mortgage Foreclosure Sales", (1980), 53 South. Cal. L. Rev. 843.**Words and phrases considered:**

forced sale for cashforced sale on termsmarket value

Appeal from judgment of Bracco J.A., 12th November 1982, setting aside Rice order and judgment for deficiency and granting defendants leave to file statement of defence; Appeal from decision of Legg J., 20th August 1982, dismissing appeal from Rice order and judgment for deficiency.

***McGillivray C.J.A.*:**

1 I concur with the whole of the reasons for judgment of Laycraft J.A.

2 The legislature of Alberta has provided by s. 44(1) of the Law of Property Act, R.S.A. 1980, c. L-8, that one effect of a foreclosure of a mortgage is that the mortgage debt is fully satisfied so that there can then be no action against the mortgagor on its covenant to pay nor against guarantors. One question here is whether the mortgagee who buys the land at a court conducted sale is to be treated as if he had foreclosed or may he then have a judgment for any deficiency against the mortgagor and guarantors.

3 It is argued that if the mortgagee purchases, the result is the same as if he foreclosed; he acquires the land. It is argued that the mortgagee should not be able to sue for any deficiencies. It is argued that abuses can occur. *Gordon Grant & Co. v. Boos*, [1926] A.C. 781, [1926] 3 W.W.R. 57, is an example of this. No one in this court likes the result of *Boos* but that decision has been followed in this province and is the law. While there have been many opportunities for the legislature to equate purchase by a mortgagee with foreclosure it has not done so. I am of the opinion that this court particularly in commercial matters should not change the rules in the course of the game. Indeed, the legislature is the proper forum to weigh the protection of borrowers against the rights of lenders who if they are to lend in this province will require reasonable security.

4 I think that both judgments of Laycraft and Moir JJ.A. will make it clear that masters and trial judges should in every case seek by whatever means possible to obtain a genuinely fair price for land that is to be sold and, indeed, the exercise of that discretion may be subject to review by this court in a proper case.

***Moir J.A.* (dissenting in part):**

TAB 9

2001 CarswellAlta 964, [2001] A.W.L.D. 482, [2001] 9 W.W.R. 299, 27 C.B.R. (4th) 236, 94 Alta. L.R. (3d) 389, 295 A.R. 113

C
2001 CarswellAlta 964

Hunters Trailer & Marine Ltd., Re

In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as Amended

In the Matter of Hunters Trailer & Marine Ltd.

Alberta Court of Queen's Bench

Wachowich J.

Heard: May 2, 2001
Judgment: June 21, 2001
Docket: Edmonton 0003-19315

Counsel: *Kentigern A. Rowan*, for Canadian Western Bank

Terrence M. Warner, for CIT Financial Ltd.

Douglas H. Shell, for Deutsche Financial Services

Juliana E. Topolniski, Q.C., for Gillespie Farrell

Charles P. Russell, for Reynolds, Mirth, Richards and Farmer

Michael J. McCabe, *K. Becker*, for Hunters Trailer & Marine Ltd.

Subject: Insolvency

Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangement Act — Miscellaneous issues

On September 25, bank agreed to company's proposal that company would apply for order pursuant to Companies' Creditors Arrangement Act and would attempt to formulate plan acceptable to creditors — Bank provided interim financing to cover critical spending pending granting of order under Act — On October 11 stay of proceedings was granted and limited debtor-in-possession financing with super-priority over other claims was authorized — Bank, as debtor-in-possession lender, was authorized to be reimbursed for advances made between September 25 and October 11 — Financial advisors and legal counsel were granted charge against company's

property in priority to all other charges except debtor-in-possession security including for work done between September 25 and October 11 — Stay of proceedings under Act was extended on notice to creditors, was subsequently terminated and receiver was appointed — Creditors took issue with administrative charges relating to company's legal and financial advisors and questioned jurisdiction to direct that funds advanced prior to proceedings under Act receive super-priority — Court had inherent or equitable jurisdiction to grant super-priority for debtor-in-possession financing and administrative costs, including costs invoked when initial application under Act was made — Jurisdiction was invoked when initial applications is made under Act, but court was not limited to granting only priority for costs arising after date of initial order — If costs were reasonably advanced to maintain status quo pending application under Act or were incurred in preparation for proceedings under Act, they fell under super-priority — Likely that company would have ceased to carry on business if bank had not advance money from September 25 — Legal and accounting services were essential for company to have possibility of arriving at arrangement with creditors — Priority was granted as there was no alternative to assure that services would be available — Legal and accounting expenses prior to refusal to extend stay were reasonably incurred — Legal and accounting fees incurred prior to initial order were incurred in connection with initial application and received same priority as post-application expenses — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

Cases considered by *Wachowich J.*:

Alberta-Pacific Terminals Ltd., Re (1991), 8 C.B.R. (3d) 99 (B.C. S.C.) — considered

Baxter Student Housing Ltd. v. College Housing Co-operative Ltd. (1975), [1976] 2 S.C.R. 475, [1976] 1 W.W.R. 1, 20 C.B.R. (N.S.) 240, 57 D.L.R. (3d) 1, 5 N.R. 515 (S.C.C.) — considered

Dylex Ltd., Re (January 23, 1995), Doc. B-4/95 (Ont. Gen. Div.) — considered

Hongkong Bank of Canada v. Chef Ready Foods Ltd. (1990), 51 B.C.L.R. (2d) 84, 4 C.B.R. (3d) 311, (sub nom. *Chef Ready Foods Ltd. v. Hongkong Bank of Canada)* [1991] 2 W.W.R. 136 (B.C. C.A.) — referred to

Nova Metal Products Inc. v. Comiskey (Trustee of) (1990), 1 C.B.R. (3d) 101, (sub nom. *Elan Corp. v. Comiskey)* 1 O.R. (3d) 289, (sub nom. *Elan Corp. v. Comiskey)* 41 O.A.C. 282 (Ont. C.A.) — considered

Pacific National Lease Holding Corp., Re (August 17, 1992), Doc. A922870 (B.C. S.C.) — considered

Pacific National Lease Holding Corp., Re (1992), 72 B.C.L.R. (2d) 368, 19 B.C.A.C. 134, 34 W.A.C. 134, 15 C.B.R. (3d) 265 (B.C. C.A. [In Chambers]) — referred to

Reference re Companies' Creditors Arrangement Act (Canada), 16 C.B.R. 1, [1934] S.C.R. 659, [1934] 4 D.L.R. 75 (S.C.C.) — referred to

Robert F. Kowal Investments Ltd. v. Deeder Electric Ltd. (1975), 9 O.R. (2d) 84, 21 C.B.R. (N.S.) 201, 59 D.L.R. (3d) 492 (Ont. C.A.) — referred to

Royal Oak Mines Inc., Re (1999), 6 C.B.R. (4th) 314 (Ont. Gen. Div. [Commercial List]) — considered

Royal Oak Mines Inc., Re (1999), 7 C.B.R. (4th) 293 (Ont. Gen. Div. [Commercial List]) — considered

Smoky River Coal Ltd., Re, [2000] 10 W.W.R. 147, 83 Alta. L.R. (3d) 127, 19 C.B.R. (4th) 281, 2000 ABQB 621 (Alta. Q.B.) — considered

Starcom International Optics Corp., Re (1998), 3 C.B.R. (4th) 177 (B.C. S.C. [In Chambers]) — considered

United Used Auto & Truck Parts Ltd., Re (1999), 12 C.B.R. (4th) 144 (B.C. S.C. [In Chambers]) — considered

United Used Auto & Truck Parts Ltd., Re, 2000 BCCA 146, 73 B.C.L.R. (3d) 236, [2000] 5 W.W.R. 178, 16 C.B.R. (4th) 141, 135 B.C.A.C. 96, 221 W.A.C. 96 (B.C. C.A.) — followed

United Used Auto & Truck Parts Ltd., Re, 2000 CarswellBC 2132, 2000 CarswellBC 2133, 261 N.R. 196 (note), 149 B.C.A.C. 160 (note), 244 W.A.C. 160 (note) (S.C.C.) — referred to

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Generally — referred to

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

Generally — considered

s. 11.3 [en. 1997, c. 12, s. 124] — referred to

RULING regarding super-priority for debtor-in-possession financing and administrative costs.

Wachowich J.:

2001 CarswellAlta 964, [2001] A.W.L.D. 482, [2001] 9 W.W.R. 299, 27 C.B.R. (4th) 236, 94 Alta. L.R. (3d) 389, 295 A.R. 113

Background

1 On October 11, 2000 I granted Hunters Trailer & Marine Ltd. ("Hunters"), *ex parte*, a 30 day stay of proceedings under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 as. am. ("*CCAA*") and further authorized limited debtor in possession ("DIP") financing with a super-priority status over other claims. I granted the Monitor appointed by my Order and Hunters' counsel and financial advisors a charge against the present and future property of Hunters ("Administrative Charge") in priority to all other charges except the DIP security. In addition, I ordered that Canadian Western Bank ("CWB"), the DIP lender, be reimbursed from the authorized DIP financing for any advances made between September 25, 2000 and the date of my Order. Those advances amount to $150,596.10, approximately 94 percent of which was used to cover Hunter's payroll. The balance was for payment of essential expenses such as security for the premises. My Order of October 11th also contained a standard comeback clause in which a two day notice period was specified.

2 The stay of proceedings was extended by Wilson J. on November 8, 2000. By Order dated December 7, 2000 I terminated the stay and appointed Deloitte Touche Inc. as interim receiver of the company under the *Bankruptcy and Insolvency Act*. Deutsche Financial Services ("Deutsche") and Bank of America Specialty Group Ltd. ("Bank of America"), two of Hunters' floor plan financiers, take issue with the Administrative Charge as it relates to Hunter's legal and financial advisors. Along with C.I.T. Financial Ltd. ("CIT"), they also question this Court's jurisdiction to direct that funds advanced prior to the commencement of the *CCAA* proceedings be paid from the DIP financing provided for in those proceedings and question the propriety of my direction based on the facts of this case. At the time of my October 11th Order, Deutsche, Bank of America and CIT were owed in excess of $7.5 million by Hunters, representing over 70 percent of the secured debt and 60 percent of the total indebtedness of Hunters.

Payment of Hunters' Legal and Accounting Advisors

Arguments of the Parties

3 Deutsche recognizes that the Court has inherent jurisdiction to allow super-priority for administrative costs, thereby subordinating existing security, but argues that this jurisdiction should only be exercised in exceptional circumstances. The Bank submits that it is wrong that Reynolds Mirth Richards and Farmer ("Reynolds"), as Hunters' solicitors, and Gillespie Farrell LLP, as their accountants, should be granted a super-priority over the secured claims of Deutsche and other floor financing creditors to the extent that such costs were incurred to unsuccessfully defend the stay of proceedings granted in the *ex parte CCAA* Order of October 11, 2000. According to Deutsche, super-priority should only apply if:

> (a) the accounts were reasonably incurred for the restructuring of Hunters as opposed to any defence of the initial Order; and

(b) there is clear and cogent evidence that there was a reasonable prospect of a successful re-structuring.

4 Deutsche also contends that it would not be appropriate to uphold the super-priority of the Administrative Charge for the payment of the accounts as Hunters did not seek the cooperation of Deutsche for the restructuring of its affairs prior to bringing its *ex parte* application, Deutsche has never agreed to super-priority for the Administration Charge and Deutsche and the other floor financing secured creditors ultimately were successful in securing an order lifting the stay of proceedings.

5 During oral argument, Deutsche indicated that it was no longer contesting the legal fees for the period October 11th to November 17th, the date on which Deutsche, CIT and Bank of America brought application to have the stay of proceedings lifted and the *CCAA* Order vacated.

6 In presenting its initial application for a stay, Hunters put affidavit evidence before the Court stating that Bank of America had indicated its willingness to participate in a work-out plan. Bank of America maintains that this representation was misleading. Bank of America did not have the benefit of legal counsel until after my initial Order was granted. While it was prepared to consider reasonable proposals by Hunters as an alternative to liquidation, it had not been provided with current financial statements which would have demonstrated the magnitude of Hunters' financial problems and it did not indicate that it would consider an arrangement based on a *CCAA* order such as the Order granted.

7 Bank of America suggests that it was inappropriate for the initial *CCAA* Order or at least those clauses in the Order dealing with the accounting and legal fees to have been sought or granted on an *ex parte* basis given that the relief claimed was clearly prejudicial to the rights and interests of the first charge secured lenders and no emergent or extraordinary need existed to prioritize the legal and accounting fees of the debtor's advisors over the interests of those lenders.

8 The primary argument advanced by Bank of America appears to be that super-prioritization of the fees of the debtor's professional advisors is not justified as the *CCAA* proceedings were doomed to failure.

9 CWB makes no submissions with respect to payment of Hunters' legal and accounting expenses, but indicates that it is prepared to pay its fair share thereof if the Court deems that these expenses properly form part of the Administrative Charge.

10 Gillespie notes in its submissions that one of its partners, Brian Farrell, acted as Hunters' external accountant for approximately 10 years and during that period also effectively functioned as its chief financial officer. From about September 30 to December 7, 2000, Mr. Farrell performed some of the functions of Hunters' comptroller. Mr. Farrell deposed in an affidavit filed in these proceedings that he had believed that a restructuring of Hunters' financial affairs could be accomplished under the *CCAA* and that secured creditors could have been paid out in full if

Hunters was permitted to carry on its operations during what was its traditionally low season. He further indicated that Gillespie would not have provided professional services to Hunters without the assurance provided by the Administrative Charge that it would be compensated for its work. Gillespie suggests that there was unreasonable delay on the part of Deutsche and Bank of America in bringing their application challenging this aspect of the Administrative Charge.

11 Gillespie argues that while the *CCAA* was intended to preserve the status quo, that does not mean preservation of the relative pre-debt status of each creditor nor is it intended to create a rigid freeze of relative pre-stay positions.

12 Hunters and Reynolds submit that it is not uncommon for orders to be sought under the *CCAA* either on short notice or without notice to certain creditors and with little opportunity on the part of the court for review and consideration of the facts and issues in advance.

13 They argue that the affidavit of Kent Andrews confirms that Bank of America participated in some discussions with Hunters regarding a work-out prior to October 11, 2000 and the affidavit of Gerhard Rodrigues demonstrates that up until the motion to set aside the initial Order Bank of America was considering how it might participate in a restructuring of Hunters.

14 Hunters and Reynolds suggest that it was reasonable for Hunters to continue working towards an arrangement under the *CCAA* and to incur legal costs in the process at least so long as the stay was in place. They contend that a debtor company requires legal advice in order to successfully restructure its affairs under the *CCAA* and that legal counsel must be given reasonable assurance of payment.

Analysis

15 The aim of the *CCAA* is to maintain the status quo while an insolvent company attempts to bring its creditors on side in terms of a plan of arrangement which will allow the company to remain in business to the mutual benefit of the company and its creditors (*Reference re Companies' Creditors Arrangement Act (Canada)*, [1934] S.C.R. 659, 16 C.B.R. 1 (S.C.C.), at 2; *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 4 C.B.R. (3d) 311 (B.C. C.A.), at 315-316).

16 Madam Justice Huddart in *Alberta-Pacific Terminals Ltd., Re* (1991), 8 C.B.R. (3d) 99 (B.C. S.C.) and Mr. Justice Brenner in *Pacific National Lease Holding Corp., Re* (August 17, 1992), Doc. A922870 (B.C. S.C.), leave to appeal denied(1992), 15 C.B.R. (3d) 265 (B.C. C.A. [In Chambers]), suggested that maintaining the status quo does not necessarily mean preservation of the relative pre-stay debt status of each creditor as other interests are served by a stay order under the *CCAA*.

17 Finlayson J.A. (Krever J.A. concurring) in *Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 1 C.B.R. (3d) 101 (Ont. C.A.), at 120 agreed with the statement made by Gibbs

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J.A. in *Hongkong Bank of Canada* that the Act was designed to serve a "broad constituency of investors, creditors and employees" and instructed that:

> Because of that "broad constituency", the Court must, when considering applications brought under the Act, have regard not only to the individuals and organizations directly affected by the application, but also to the wider public interest. That interest is generally, but not always, served by permitting an attempt at reorganization: see S.E. Edwards, "Reorganizations Under the Companies' Creditors Arrangement Act," [(1947) 25 Can. Bar Rev. 587] at p. 593.

18 I agree with the statement made by Mackenzie J.A. in *United Used Auto & Truck Parts Ltd., Re* (2000), 16 C.B.R. (4th) 141 (B.C. C.A.), at 146 that: "...the *CCAA*'s effectiveness in achieving its objectives is dependent on a broad and flexible exercise of jurisdiction to facilitate a restructuring and continue the debtor as a going concern in the interim."

19 To qualify for *CCAA* protection a company must be insolvent. The reality is that most companies that find themselves in such a position are unlikely to have the financial resources to pay for the advisors required to embark upon, formulate and present a restructuring plan under the *CCAA*. As a result, the practice has developed whereby debtor companies in the initial application for *CCAA* protection seek to secure payment of their professional advisors through an administrative charge on the assets of the company in priority to the claims of other secured creditors, except possibly the DIP lender.

20 In *Starcom International Optics Corp., Re* (1998), 3 C.B.R. (4th) 177 (B.C. S.C. [In Chambers]), the British Columbia Supreme Court considered whether the fees of professional advisors other than the monitor should be paid in priority to the claims of creditors in *CCAA* proceedings. As in the present case, the initial *ex parte* order had provided for such priority. However, on reconsideration of the stay, Saunders J. noted that there was no evidence presented as to whether the priority for professional fees was required to enable the operations of the debtor company to continue. She concluded that the protection of s. 11.3 of the Act permitting a person providing services to require immediate payment for those services and the significant cash flow projections of the company would serve as adequate protection for the fees for professional services. The terms of the initial order therefore were amended to provide for priority only for the monitor's fees. However, it was apparent that Saunders J. was of the view that the court had the jurisdiction to grant a super-priority for the administrative charge and that she considered it important that professional fees be protected in some manner.

21 Many initial orders under the *CCAA* are sought on short notice or on an *ex parte* basis. In fact, the Act allows for initial *ex parte* orders and gives the applicant 30 days in which to generate support for the order among its creditors.

22 As Mr. Justice Blair recognized in *Royal Oak Mines Inc., Re* (1999), 6 C.B.R. (4th) 314 (Ont. Gen. Div. [Commercial List]), the court in most cases is asked on the initial application to respond with little advance opportunity to examine the materials filed in support of the applica-

tion. In view of the "real time" nature of such applications, he recommended to those drafting initial stay orders that they confine the relief sought to what is essential for the continued operations of the company during a brief "sorting out" period. He suggested that extraordinary relief such as DIP financing and super-priorities be kept in the initial order to what is reasonably necessary to meet the debtor company's urgent needs during the sorting-out period since such measures may involve a significant re-ordering of the pre-application priorities. At p. 322 he advised that:

> Such changes should not be imported lightly, if at all, into the creditor's mix; and affected parties are entitled to a reasonable opportunity to think about their potential impact, and to consider such things as whether or not the ***CCAA*** approach to the insolvency is the appropriate one in the circumstances — as opposed for instance, to a receivership or bankruptcy — and whether or not, or to what extent, they are prepared to have their positions affected by DIP or super priority financing.

23 Although Mr. Justice Blair did not specify what he considered to be a reasonable "sorting out" period, he did state at p. 319:

> Conceptually, then, the applicant is provided with the protections of a stay, a restraining order and a prohibition order for a period "not exceeding 30 days" in order to give it time to muster support for and justify the relief granted in the Initial Order, all interested persons then having received reasonable notice and having had a reasonable opportunity to consider their respective positions. The difficulties created by *ex parte* and short notice proceedings are thereby attenuated.

24 Mr. Justice Farley, who subsequently took carriage of the *Royal Oak Mines Inc., Re* case, held at (1999), 7 C.B.R. (4th) 293 (Ont. Gen. Div. [Commercial List]) that, "in light of the very general framework of the *CCAA*, judges must rely upon inherent jurisdiction to deal with *CCAA* proceedings. However, inherent jurisdiction is not limitless; if the legislative body has not left a functional gap or vacuum, the inherent jurisdiction should not be brought into play." He refused to interfere with the super-priority granted by Blair J. for DIP financing as he felt that Mr. Justice Blair had properly engaged in the necessary balancing of the interests of the debtor company, the creditors and other interested parties.

25 Michael B. Rotsztain, in an article entitled "Debtor-In-Possession Financing in Canada: Current Law and a Preferred Approach," presented on February 22, 2000 at the Conference of the Canadian Turnaround Management Association, Toronto, Ontario suggested that DIP financing as a whole only be considered to meet urgent short-term needs and that further DIP financing be granted only in limited circumstances.

26 The jurisdiction of the court to grant super-priority for legal expenses incurred by a debtor-in-possession in connection with its efforts to restructure its affairs under the *CCAA* was considered by an appellate court for the first time in *United Used Auto & Truck Parts Ltd., Re*,

supra (leave to appeal to S.C.C. granted [2000] S.C.C.A. No. 142 (S.C.C.), appeal discontinued). The chambers judge, Tysoe J., had granted an *ex parte* order which specified that the reasonable fees and disbursements of counsel for the debtors should be included with the monitor's fees and disbursements in an administrative charge which was to be given super-priority over the charges of other creditors. The secured creditors brought an application to set aside the order. The application was heard 11 days after the initial order was granted. Tysoe J. continued the charge as he considered that these were necessary expenses for the successful restructuring of the company. At pp. 154-155 of his decision ((1999), 12 C.B.R. (4th) 144 (B.C. S.C. [In Chambers])), Mr. Justice Tysoe held:

> ... in the event that the restructuring is not successful and there is a shortfall in the recovery for the secured lenders, it would not be fair to require those lenders to bear all of the burdens of the expense of the lawyers for the Petitioners in acting against them. The secured lenders should not be expected to underwrite the expense of lawyers who act unreasonably or who act on unreasonable instructions to frustrate them in the recovery of the monies owed to them.
>
> Hence, I am prepared to give a priority charge in respect of the Petitioners' legal expenses to the extent that they are reasonably incurred in connection with the restructuring. As an example, if the Court were to conclude that the position of the Petitioners' on an application was unreasonable, the Petitioners' counsel would not have the benefit of the priority and would have to look to other sources for payment.

27 It was apparent in *United Used Auto & Truck Parts Ltd., Re* that the cash flow of the business would be insufficient to pay the legal expenses, particularly in the absence of DIP financing which Tysoe J. refused to grant. Mackenzie J.A., who delivered the judgment of the Court of Appeal, commented at p. 152 in terms of the super-priority granted for the monitor's expenses:

> When, as here, the cash flow from operations is insufficient to assure payment and asset values exceeding secured charges are in doubt, granting a super-priority is the only practical means of securing payment. In such circumstances, if a super-priority cannot be granted without the consent of secured creditors, then those creditors would have an effective veto over ***CCAA*** relief. I do not think that Parliament intended that the objects of the Act could be indirectly frustrated by secured creditors.

28 Mackenzie J.A. characterized the administrative charge as a limited substitute for DIP financing. He was of the view that the jurisdiction to grant super-priority for the debtor's legal fees was dependent on the court's power to allow a super-priority for DIP financing. This type of super-priority was first allowed over the objections of a secured creditor in *Dylex Ltd., Re* (January 23, 1995), Doc. B-4/95 (Ont. Gen. Div.). Houlden J.A. in that case considered that the broader interest of 12,000 employees of the debtor company justified imposing a super-priority for bridge financing.

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29 Mackenzie J.A. also indicated in *United Used Auto & Truck Parts Ltd., Re* at p. 151 that the jurisdiction to grant a super-priority for the debtor's legal expenses, whether alone or as part of DIP financing, rests on the same equitable foundation as the monitor's fees and disbursements. He drew an analogy between the jurisdiction to grant the monitor's fees and the jurisdiction to secure the fees of a court-appointed receiver. Both are rooted in equity but as Mackenzie J.A. pointed out at p. 150: "the monitors' jurisdiction serves a broader statutory objective under the *CCAA*." Therefore, the court's inherent or equitable jurisdiction cannot be restricted as it is in a receivership where the receiver's fees and disbursements may only be charged against the security held by the secured creditors of the debtor:

> (a) if a receiver has been appointed with the approval of the holders of security;
>
> (b) if a receiver has been appointed, on notice to the creditors, to preserve and realize assets for the benefit of all interested parties, including secured creditors; or
>
> (c) if a receiver has expended money for the necessary preservation or improvement of the property.

(*Robert F. Kowal Investments Ltd. v. Deeder Electric Ltd.* (1975), 21 C.B.R. (N.S.) 201 (Ont. C.A.)).

30 In commenting on *United Used Auto & Truck Parts Ltd., Re* at the Eleventh Annual Conference and General Meeting of the Insolvency Institute of Canada held in October, 2000, Douglas I. Knowles suggested that as the Supreme Court of Canada had granted leave to appeal:

> ... monitors and DIP financiers must carefully consider whether or not to become involved in [the] ***CCAA*** process absent some other source of security for their fees and loans until the Supreme Court of Canada has affirmatively concluded that the jurisdiction to create such priority charges exist. If such is not the conclusion of the Supreme Court of Canada then, at least with respect to the Monitor's fees, the CCAA will only be available to those insolvent companies with sufficient unencumbered assets or unencumbered cash flow to ensure payment of the monitor's fees without the necessity of creating such a charge.

31 The appeal has since been discontinued.

32 Having reviewed the jurisprudence on this issue, I am satisfied that the Court has the inherent or equitable jurisdiction to grant a super-priority for DIP financing and administrative charges, including the fees and disbursements of the professional advisors who guide a debtor company through the *CCAA* process. Hunters brought its initial *CCAA* application *ex parte* because it was insolvent and there was a threat of seizure by some of its major floor planners. If super-priority cannot be granted without the consent of secured creditors, the protection of the *CCAA* effectively would be denied a debtor company in many cases.

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33 I am aware, however, that administrative costs and DIP financing can erode the security of creditors. LoVecchio J. in *Smoky River Coal Ltd., Re* (2000), 19 C.B.R. (4th) 281 (Alta. Q.B.), at 290, raised a caution flag in this regard, stating at p. 290:

> While the ***CCAA*** requires a large and liberal interpretation in order to be effective, the need for caution arises when the Court exercises its inherent jurisdiction under this statute. Although the ***CCAA*** serves a vital and important role in a reorganization, the general statutory scheme of priorities of creditors must not be overlooked. As the Court is altering this scheme, the exercise of the power of the Court to create classes of creditors with a super-priority status should not be taken lightly. Especially in light of the fact that this action could prejudice the recovery of creditors who would, but for the Order, enjoy a priority if a receivership or bankruptcy ultimately ensues.

34 It is preferable that priority for administrative costs and DIP financing be dealt with on notice to all interested parties. However, if the circumstances warrant, priority may be granted on the initial application, but on a limited basis only until the matter is considered on notice to those affected by the order. That is precisely what occurred in this case. Hunters brought an application on November 8th for an extension of the stay of proceedings. This application was made on notice to the secured creditors. If they had wanted to challenge the initial Order before that date, they could have done so on two days' notice.

35 In my view, the services of both Reynolds and Gillespie were essential if Hunters was to have any possibility of arriving at an arrangement with its creditors which would allow Hunters to carry on its business. The priority assigned to the Administrative Charge in my Order of October 11, 2000 was granted as there was no other reasonable alternative to assure that the services of Reynolds and Gillespie would be available to Hunters. The Administrative Charge met the debtor company's urgent needs during the sorting-out period.

36 I do not accept the argument advanced by the objecting creditors that it is only in the case of a successful arrangement under the *CCAA* that priority for the fees and disbursements of professional advisors should be confirmed. Professional advisors acting for a debtor company must act in a reasonable manner, but they are not guarantors of the success of restructuring. Nor is it unreasonable for the debtor company to defend a creditor's challenge to the initial *CCAA* order.

37 My initial Order was granted as I was satisfied on the facts then before me that there was a reasonable prospect that Hunters could make arrangements with its creditors which would allow it to remain in business. Despite the express provision in my Order of October 11, 2000 permitting interested parties to apply on two days notice to vary the Order or to seek other relief, the first indication received by the Court from Bank of America that it opposed the Order was the application of Hunter's major secured creditors to have the initial Order vacated and the supporting affidavit of Kent Andrews filed on November 17, 2000.

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38 Counsel for Bank of America had sent a letter to Hunters and CWB on November 8th expressing concern with the terms of the Order, particularly the terms of the DIP financing, but no mention was made of the Administrative Charge. The letter indicated that unless a satisfactory agreement could be reached on amendment of the Order, an application would be brought to have the terms of the Order varied or to terminate the stay. On December 1, 2000 I refused Hunters' request for an extension of the stay but extended the existing stay to December 8, 2000. It was apparent at that time that there was insufficient evidence to establish that the benefits of DIP financing (and the Administrative Charge) would clearly outweigh the potential prejudice to the objecting creditors.

39 In my view, the legal and accounting expenses of Hunters incurred up to Dec. 1st were reasonably incurred in connection with the *CCAA* proceedings and restructuring efforts. Any such expenses incurred after December 1st are not entitled to super-priority status.

40 Certain of the accounts of Reynolds are for work undertaken between September 25, 2000 and October 11th in preparation for the initial *CCAA* application. I have concluded below that this Court has jurisdiction to grant priority to DIP financing advanced prior to my Order of October 11th. I reach the same conclusion in terms of the legal and accounting fees and disbursements which pre-date the initial *CCAA* order. Hunters' expenses in this regard were incurred in connection with the initial application and should receive the same priority as the post-application expenses. incurred in connection with the initial application and should receive the same priority as the post-application expenses.

Jurisdiction to Order Pre-CCAA CWB Advances to be Paid from DIP Financing

Background

41 According to CWB, it was informed by representatives of Hunters on September 22, 2000 that Hunters was insolvent. As of that date, Hunters was indebted to CWB in an amount in excess of $1 million. On September 25, 2000 CWB agreed to a proposal presented by Hunters whereby Hunters would apply for an order pursuant to the *CCAA* and then would attempt to formulate a plan of arrangement acceptable to its creditors. CWB also agreed to provide DIP financing if the *CCAA* Order could be obtained.

42 CWB recognized that it would take Hunters some time to make the initial *CCAA* application. Therefore, it agreed to provide interim financial assistance to cover Hunters' payroll and other critical expenses pending the granting of a *CCAA* order on condition that, if Hunters was successful in obtaining the order and DIP financing, CWB's advances would form part of the DIP financing to be repaid in priority to other creditors.

Position of Canadian Western Bank

43 CWB contends that the Court's inherent jurisdiction is sufficiently broad to allow for an

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order that pre-*CCAA* advances may be paid from DIP financing. According to CWB, the *CCAA* is remedial legislation that should be given a wide and liberal interpretation in order to effect a practical result. The intention of the legislation is to give corporations facing a business failure breathing room in order to negotiate with creditors.

44 CWB further argues that since its actions were directed toward the preservation of the assets and business of Hunters for the benefit of all creditors, it was appropriate that the advances be reimbursed from the DIP financing. In an affidavit filed in support of the application by CWB, Richard Hallson, a manager of commercial banking for CWB, deposes that it was the opinion of CWB at the time that Hunters was suffering a financial crisis by reason of the seasonal nature of its business and the fact that it was entering into the slowest portion of its business cycle. It was also the opinion of CWB that Hunters had a reasonable prospect of formulating an acceptable and reasonable plan of arrangement.

45 CWB argues that the purpose of the *CCAA* should not be frustrated by denying the benefits of the Act to those debtors who cannot finance their minimum expenses while they prepare a *CCAA* application.

Position of Other Secured Creditors

47 CIT takes the position that this Court does not have the jurisdiction to grant super-priority status to advances made before commencement of the *CCAA* as the Court's jurisdiction arises from the *CCAA*. It argues that creation of a super-priority for such charges would result in the reordering of existing priorities and other vested interests established prior to the date the initial Order was issued. CIT suggests that as DIP financing is an extraordinary remedy, there must be clear evidence that its benefits outweigh the potential prejudice to lenders.

48 CIT also contends that principles of fairness dictate that CWB should not be permitted to foist the entire burden of its unilateral decision to continue to support Hunters on the other secured creditors. Accordingly, if the Court determines that it is appropriate to permit payment of this portion of the DIP financing to CWB, such payment should be prorated so that CWB bears its proportionate share of the burden of the DIP financing.

49 Bank of America adopts the submissions of CIT with regard to the pre-October 11, 2000 advances on DIP financing.

Conclusion

50 In *Baxter Student Housing Ltd. v. College Housing Co-operative Ltd.* (1975), [1976] 2 S.C.R. 475 (S.C.C.), the Supreme Court of Canada recognized that there is a limit to the inherent jurisdiction of superior courts, stating at p. 480:

> Inherent jurisdiction cannot, of course, be exercised so as to conflict with a statute or a rule.

2001 CarswellAlta 964, [2001] A.W.L.D. 482, [2001] 9 W.W.R. 299, 27 C.B.R. (4th) 236, 94 Alta. L.R. (3d) 389, 295 A.R. 113

> Moreover, because it is a special and extraordinary power, it should be exercised only sparingly and in a clear case.

51 As I have indicated above, I am of the view that the Court has the inherent or equitable jurisdiction to grant a super-priority for DIP financing and administrative costs, including those of the monitor and professional advisors of the debtor company. While this jurisdiction is invoked when an initial application is made under the *CCAA*, the Court is not limited to granting a priority only for those costs which arise after the date of the application or initial order. So long as the monies were reasonably advanced to maintain the status quo pending a *CCAA* application or the costs were incurred in preparation for the *CCAA* proceedings, justice dictates and practicality demands that they fall under the super-priority granted by the Court. To deny them priority would be to frustrate the objectives of the *CCAA*.

52 In the present case, it is likely that if the advances had not been made by CWB, Hunters' would have ceased to carry on business. The advances were used to cover Hunters' payroll and for security for the premises. Under these circumstances, I am prepared to order that the advances made by CWB from September 25, 2000 to October 11th be paid out of the DIP financing.

Costs

53 Reynolds, Gillespie, and CWB shall have their costs of this application on a party and party basis.

Order accordingly.

END OF DOCUMENT

TAB 10

2007 CarswellAlta 1521, 2007 ABCA 361, 37 C.B.R. (5th) 1, [2008] A.W.L.D. 1, 425 A.R. 182, 418 W.A.C. 182

C
2007 CarswellAlta 1521

Hurricane Hydrocarbons Ltd. v. Komarnicki

Hurricane Hydrocarbons Ltd., Hurricane Kumkol Limited, Hurricane Overseas Services Inc. and Hurricane Investments CJSC (Applicants / Respondents / Plaintiffs) and John J. Komarnicki (Respondent / Appellant / Defendant)

Hurricane Hydrocarbons Ltd., Hurricane Kumkol Limited, Hurricane Overseas Services Inc. and Hurricane Investments CJSC (Applicants / Respondents / Plaintiffs) and John J. Komarnicki (Respondent / Appellant / Defendant)

John J. Komarnicki (Respondent / Appellant / Defendant) and Hurricane Hydrocarbons Ltd., Hurricane Kumkol Limited, Hurricane Overseas Services Inc. and Hurricane Investments CJSC (Applicants / Respondents / Plaintiffs)

Alberta Court of Appeal

E. McFadyen, C. Hunt, P. Rowbotham JJ.A.

Heard: November 15, 2007
Judgment: November 19, 2007
Docket: Calgary Appeal 0701-0086-AC

Counsel: R.F. Steele for Applicants

L.W. Scott, Q.C. for Respondent

Subject: Insolvency; Labour and Employment; Public

Bankruptcy and insolvency --- Proposal — Companies' Creditors Arrangement Act — Arrangements — Effect of arrangement — Stay of proceedings

Debtor corporations obtained protection under Companies' Creditors Arrangement Act — Employee filed claim for notice of wrongful dismissal against two corporations — Arrangement provided for date at which claims against debtor corporations would be extinguished — Arrangement approved — Employee brought action for wrongful dismissal — Two debtor corporations began action for costs of defence and related issues — Date for resolution of claims passed — Employee's application to proceed with wrongful dismissal actions and debtor corporations' actions was dismissed — Wrongful dismissal action dismissed, employee not entitled to file

counterclaim in one proceeding and counterclaim struck in another proceeding — Employee appealed — Debtor corporations brought motion to strike appeal — Motion granted — Employee did not have leave to bring appeal — Finality of affairs is important objective of Act — Debtors' actions were within ambit of Act as they affected claims made in proceedings under Act — Employee was attempting to improperly litigate wrongful dismissal proceeding in debtors' actions as counterclaim.

Cases considered:

Lehndorff General Partner Ltd., Re (1993), 17 C.B.R. (3d) 24, 9 B.L.R. (2d) 275, 1993 CarswellOnt 183 (Ont. Gen. Div. [Commercial List]) — considered

Pacific National Lease Holding Corp., Re (1992), 72 B.C.L.R. (2d) 368, 19 B.C.A.C. 134, 34 W.A.C. 134, 15 C.B.R. (3d) 265, 1992 CarswellBC 524 (B.C. C.A. [In Chambers]) — referred to

Smoky River Coal Ltd., Re (1999), 1999 CarswellAlta 128, (sub nom. *Luscar Ltd. v. Smoky River Coal Ltd.)* 237 A.R. 83, (sub nom. *Luscar Ltd. v. Smoky River Coal Ltd.)* 197 W.A.C. 83, 1999 ABCA 62 (Alta. C.A.) — referred to

Smoky River Coal Ltd., Re (1999), 12 C.B.R. (4th) 94, 1999 ABCA 179, 71 Alta. L.R. (3d) 1, 175 D.L.R. (4th) 703, 237 A.R. 326, 197 W.A.C. 326, [1999] 11 W.W.R. 734, 1999 CarswellAlta 491 (Alta. C.A.) — referred to

Statutes considered:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

Generally — referred to

s. 13 — considered

MOTION by debtors to strike appeal of employee from judgment dismissing action for wrongful dismissal.

***Per curiam*:**

1 The applicants, Hurricane Hydrocarbons Ltd., Hurricane Kumkol Limited, Hurricane Overseas Services Inc. and Hurricane Investments CJSC (collectively, the Hurricane companies), apply to strike the appeal of the respondent, Komarnicki, on the basis that he failed to obtain leave pursuant to s. 13 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (CCAA). The application is granted and the appeal is struck.

Factual background

2 The applicants, Hurricane Hydrocarbons Ltd. and Hurricane Overseas Services Inc., received creditor protection under the CCAA on May 14, 1999. The respondent submitted a notice of claim in the CCAA proceedings alleging wrongful dismissal from employment with Hurricane Hydrocarbons Ltd. and Hurricane Overseas Services Inc., which they disputed.

3 No determination was made on the merits of the disputed claim prior to February 28, 2000 when the Plan of Compromise and Arrangement (Plan) received court approval. The Plan provided that any disputed claim not resolved by March 31, 2005 was deemed to be forever extinguished, terminated and cancelled.

4 In October 2000, the respondent commenced a claim in the Court of Queen's Bench seeking damages for wrongful dismissal from Hurricane Hydrocarbons Ltd. and Hurricane Overseas Services Inc.

5 On February 28, 2001, the Hurricane companies commenced an action in the Court of Queen's Bench seeking indemnity from the respondent for costs or damages resulting from the Hurricane companies' defence of various claims (Hurricane #1 action). Because counsel for the Hurricane companies did not immediately receive a filed copy of the statement of claim, out of an abundance of caution to avoid expiry of a limitation period, a second identical statement of claim was filed on March 1, 2001 (Hurricane #2 action). The Hurricane #1 action was served in January 2002 and the Hurricane #2 action was never served. The Hurricane #1 and #2 actions were not claims within the CCAA proceedings.

6 On August 9, 2002, Hurricane Hydrocarbons Ltd. and Hurricane Overseas Services Inc. filed a statement of defence to the respondent's wrongful dismissal action. On August 14, 2002, the respondent filed a statement of defence to the Hurricane #1 action.

7 The March 31, 2005 drop dead date passed without resolution of the respondent's wrongful dismissal claim.

8 On March 22, 2006, almost one year past the drop dead date, the respondent filed a statement of defence and counterclaim in the Hurricane #2 action. The counterclaim is virtually identical to the wrongful dismissal action. On October 13, 2006, the respondent applied to the Court of Queen's Bench for a declaration that he was entitled to take the next step in his wrongful dismissal action and counterclaim in Hurricane #2 action, and sought to add to the Hurricane #1 action a counterclaim, which was, again, virtually identical to the wrongful dismissal action and the counterclaim in the Hurricane #2 action. The Hurricane companies applied to strike the wrongful dismissal action and the counterclaim in Hurricane #2 action, and opposed the addition of a counterclaim in the Hurricane #1 action.

9 The chambers judge dismissed the wrongful dismissal action, struck the counterclaim and re-

fused to allow the addition of a counterclaim to the Hurricane #1 action.

10 The respondent filed a notice of appeal in this Court and was advised by the Deputy Registrar that leave pursuant to section 13 of the CCAA might be required. The Hurricane companies brought this motion to strike the appeal.

Issue

11 Does section 13 of the CCAA apply to the respondent's wrongful dismissal action and counterclaim?

Relevant legislation

12 Section 13 of the CCAA provides:

> Except in Yukon, any person dissatisfied with an order or a decision made under this Act may appeal from the order or decision on obtaining leave of the judge appealed from or of the court or a judge of the court to which the appeal lies and on such terms as to security and in other respects as the judge or court directs.

Decision

13 The requirement for leave furthers the objects and purpose of the CCAA which has been described by Farley J. in *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]) at para.31 as follows:

> The CCAA is intended to facilitate compromises and arrangements between companies and their creditors as an alternative to bankruptcy and, as such, is remedial legislation entitled to a liberal interpretation. It seems to me that the purpose of the statute is to enable insolvent companies to carry on business in the ordinary course or otherwise deal with their assets so as to enable plan of compromise or arrangement to be prepared, filed and considered by their creditors and the court.

14 To further the goal of enabling a company to deal with creditors in order to continue to carry on business, the CCAA proceedings seek to resolve matters and obtain finality without undue delay. A drop dead date is one means of bringing disputed claims to an end and allowing a company to move forward. The requirement for leave to appeal similarly reinforces the finality of orders made under a CCAA proceeding and prevents continuing litigation where there are no serious and arguable grounds of significance to the parties. As noted by numerous courts, delay and uncertainty caused by appeals is a matter of concern in a CCAA proceeding: *Smoky River Coal Ltd., Re*, 1999 ABCA 62 (Alta. C.A.) at para. 22, citing *Pacific National Lease Holding Corp., Re* (1992), 15 C.B.R. (3d) 265 (B.C. C.A. [In Chambers]).

15 The scope of CCAA proceedings has been interpreted expansively by the courts and may even include non-judicial proceedings because the objective is to include proceedings that may work against the interests of creditors and render impossible the achievement of effective arrangements: *Smoky River Coal Ltd., Re*, 1999 ABCA 179, 237 A.R. 326 (Alta. C.A.) at para. 31.

16 Before us, the respondent conceded that the wrongful dismissal action was a "claim" in the CCAA proceeding and that leave is required. However, the respondent says that the counterclaims ought not to be considered "claims" because they were filed in the Hurricane #1 and #2 actions which were not CCAA proceedings. The respondent submits that it would be unfair to permit Hurricane to pursue its actions, but to prevent him from advancing his counterclaim.

17 We conclude that the decision of the chambers judge is an order or decision made under the CCAA because its operation affects a claim submitted in the CCAA proceedings. The respondent submitted a claim in the CCAA for wrongful dismissal. His claim was disputed; it was not excluded from the Plan, was not resolved before the drop dead date and no extension of that deadline was obtained. The Court of Queen's Bench action and the counterclaims are all based on the same alleged wrongful dismissal that the respondent claimed in the CCAA proceedings. The chambers judge recognized that the respondent was attempting to prosecute his wrongful dismissal claim when it has already been deemed to be extinguished, terminated and cancelled by the terms of the Plan.

18 It follows that the respondent must obtain leave to appeal the decision of the chambers judge. There was no proper application for leave before us and we make no decision in that regard. Accordingly, the application is granted and the appeal is struck.

Motion granted.

END OF DOCUMENT

TAB 11

2009 CarswellNS 229, 2009 NSSC 136, 53 C.B.R. (5th) 96, 882 A.P.R. 251, 277 N.S.R. (2d) 251

C
2009 CarswellNS 229

ScoZinc Ltd., Re

In the Matter of The Companies' Creditors Arrangement Act, R.S.C. 1985, c.C-36, as amended

And In the Matter of A Plan of Compromise or Arrangement of ScoZinc Ltd. (Applicant)

Nova Scotia Supreme Court

D.R. Beveridge J.

Heard: April 3, 2009
Judgment: April 3, 2009
Written reasons: April 28, 2009
Docket: Hfx. 305549

Counsel: John G. Stringer, Q.C., Mr. Ben R. Durnford for Applicant

Robert MacKeigan, Q.C. for Grant Thornton

Subject: Insolvency

Bankruptcy and insolvency --- Proposal — Companies' Creditors Arrangement Act — Miscellaneous issues

Company was granted protection pursuant to s. 11 of Companies' Creditors Arrangement Act ("CCAA") — Monitor was appointed pursuant to s. 11.7 of CCAA — Determination of creditors' claims was set by claims procedure order ("order") — Three creditors submitted proofs of claim by claims bar date set out in order and then submitted revised proofs of claim after claims bar date, but before date set for monitor to complete assessment of claims — Monitor determined errors in proofs of claims were due to inadvertence and issued notice of revision or disallowance, allowing claims as revised if it was determined monitor had power to do so — Monitor brought motion for directions on whether it had authority to allow revision of claim by increasing it after claim's bar date but before date set for monitor to complete assessment of claims — Monitor had necessary authority — Court creates claims process by court order — Determination that claims had to initially be identified and assessed by monitor, and heard first by claims officer, was valid exercise of court's inherent jurisdiction — Logical and practical that monitor, as officer of court, be directed to fulfil analogous role to that of trustee under Bankruptcy and Insolvency Act, and order accomplished this — Provision in order mandated monitor to review all proofs of claim

filed on or before claims bar date and accept, revise or disallow them — While normally monitor's revision would be to reduce proof of claim, nothing in order so restricted monitor's authority — It did not matter that revised claims were submitted after claims bar date — In essence, monitor simply acted to revise proofs of claim already submitted to conform with evidence elicited by monitor or submitted to it.

Cases considered by *D.R. Beveridge J.*:

Air Canada, Re (2004), 2 C.B.R. (5th) 23, 2004 CarswellOnt 3320 (Ont. S.C.J. [Commercial List]) — referred to

Blue Range Resource Corp., Re (2000), 2000 CarswellAlta 30, (sub nom. *Blue Range Resources Corp., Re)* 250 A.R. 239, (sub nom. *Blue Range Resources Corp., Re)* 213 W.A.C. 239, 15 C.B.R. (4th) 192, 2000 ABCA 16 (Alta. C.A. [In Chambers]) — referred to

Blue Range Resource Corp., Re (2000), 2000 ABCA 285, 2000 CarswellAlta 1145, [2001] 2 W.W.R. 477, (sub nom. *Enron Canada Corp. v. National-Oilwell Canada Ltd.)* 193 D.L.R. (4th) 314, 271 A.R. 138, 234 W.A.C. 138, 87 Alta. L.R. (3d) 352 (Alta. C.A.) — followed

Carlen Transport Inc. v. Juniper Lumber Co. (Monitor of) (2001), 21 C.B.R. (4th) 222, (sub nom. *Juniper Lumber Co., Re)* 233 N.B.R. (2d) 111, (sub nom. *Juniper Lumber Co., Re)* 601 A.P.R. 111, 2001 CarswellNB 21 (N.B. Q.B.) — referred to

Federal Gypsum Co., Re (2007), 2007 NSSC 384, 2007 CarswellNS 630, 261 N.S.R. (2d) 314, 835 A.P.R. 314, 40 C.B.R. (5th) 39 (N.S. S.C.) — referred to

Freeman, Re (1922), 55 N.S.R. 545, [1923] 1 D.L.R. 378, 1922 CarswellNS 57 (N.S. C.A.) — considered

Laidlaw Inc., Re (2002), 2002 CarswellOnt 790, 34 C.B.R. (4th) 72 (Ont. S.C.J. [Commercial List]) — referred to

Muscletech Research & Development Inc., Re (2006), 25 C.B.R. (5th) 231, 2006 CarswellOnt 6230 (Ont. S.C.J.) — referred to

Olympia & York Developments Ltd. v. Royal Trust Co. (1993), 17 C.B.R. (3d) 1, (sub nom. *Olympia & York Developments Ltd., Re)* 12 O.R. (3d) 500, 1993 CarswellOnt 182 (Ont. Gen. Div.) — referred to

Pine Valley Mining Corp., Re (2008), 2008 CarswellBC 579, 2008 BCSC 356, 41 C.B.R. (5th) 43 (B.C. S.C.) — referred to

Siscoe & Savoie v. Royal Bank (1994), 1994 CarswellNB 14, 29 C.B.R. (3d) 1, 157 N.B.R.

(2d) 42, 404 A.P.R. 42 (N.B. C.A.) — considered

Skeena Cellulose Inc., Re (2003), 2003 CarswellBC 1399, 2003 BCCA 344, 184 B.C.A.C. 54, 302 W.A.C. 54, 43 C.B.R. (4th) 187, 13 B.C.L.R. (4th) 236 (B.C. C.A.) — considered

Stelco Inc., Re (2005), 253 D.L.R. (4th) 109, 75 O.R. (3d) 5, 2 B.L.R. (4th) 238, 9 C.B.R. (5th) 135, 2005 CarswellOnt 1188, 196 O.A.C. 142 (Ont. C.A.) — considered

Triton Tubular Components Corp., Re (2005), 2005 CarswellOnt 4439, 14 C.B.R. (5th) 264 (Ont. S.C.J.) — referred to

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Generally — referred to

s. 135(2) — referred to

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

Generally — referred to

s. 4 — considered

s. 5 — considered

s. 6 — considered

s. 11 — pursuant to

s. 11.7 [en. 1997, c. 12, s. 124] — considered

s. 11.7(1) [en. 1997, c. 12, s. 124] — considered

s. 11.7(2) [en. 1997, c. 12, s. 124] — considered

s. 11.7(3) [en. 1997, c. 12, s. 124] — considered

s. 11.7(3)(d) [en. 1997, c. 12, s. 124] — considered

s. 12 — considered

s. 12(1) "claim" — considered

s. 12(2) — considered

Probate Act, R.S.N.S. 1900, c. 158

Generally — referred to

MOTION by monitor appointed under *Companies' Creditors Arrangement Act* for directions on whether it had authority to allow revision of claim after claim's bar date but before date set for monitor to complete its assessment of claims.

***D.R. Beveridge J.* (orally):**

1 On December 22, 2008 ScoZinc Ltd. was granted protection by way of a stay of proceedings of all claims against it pursuant to s.11 of the *Companies' Creditors Arrangement Act* R.S.C. 1985, c. C-36. The stay has been extended from time to time. Grant Thornton was appointed as the Monitor of the business and financial affairs of ScoZinc pursuant to s.11.7 of the *CCAA*.

2 The determination of creditors' claims was set by a Claims Procedure Order. This order set dates for the submission of claims to the Monitor, and for the Monitor to assess the claims. The Monitor brought a motion seeking directions from the court on whether it has the necessary authority to allow a revision of a claim after the claim's bar date but before the date set for the Monitor to complete its assessment of claims.

3 The motion was heard on April 3, 2009. At the conclusion of the hearing of the motion I concluded that the Monitor did have the necessary authority. I granted the requested order with reasons to follow. These are my reasons.

Background

4 The procedure for the identification and quantification of claims was established pursuant to my order of February 18, 2009. Any persons asserting a claim was to deliver to the Monitor a Proof of Claim by 5:00 p.m. on March 16, 2009, including a statement of account setting out the full details of the claim. Any claimant that did not deliver a Proof of Claim by the claims bar date, subject to the Monitor's agreement or as the court may otherwise order, would have its claim forever extinguished and barred from making any claim against ScoZinc.

5 The Monitor was directed to review all Proofs of Claim filed on or before March 16, 2009 and to accept, revise or disallow the claims. Any revision or disallowance was to be communicated by Notice of Revision or Disallowance, no later than March 27, 2009. If a creditor disagreed with the assessment of the Monitor, it could dispute the assessment before a Claims Officer and ultimately to a judge of the Supreme Court.

6 The three claims that have triggered the Monitor's motion for directions were submitted by Acadian Mining Corporation, Royal Roads Corp., and Komatsu International (Canada) Inc.

7 ScoZinc is 100% owned by Acadian Mining Corp. Theso two corporations share office space, managerial staff, and have common officers and directors. Acadian Mining is a substantial shareholder in Royal Roads and also have some common officers and directors.

8 Originally Royal Roads asserted a claim as a secured creditor on the basis of a first charge security held by it on ScoZinc's assets for a loan in the amount of approximately $2.3 million. Acadian Mining also claimed to be a secured creditor due to a second charge on ScoZinc's assets securing approximately $23.5 million of debt. Both Royal Roads and Acadian Mining have released their security. Each company submitted Proofs of Claim dated March 4, 2009 as unsecured creditors.

9 Royal Roads claim was for $579, 964.62. The claim by Acadian Mining was for $23,761.270.20. John Rawding, Financial Officer for Acadian Mining and ScoZinc, prepared the Proofs of Claim for both Royal Roads and Acadian Mining. It appears from the affidavit and materials submitted, and the Monitor's fifth report dated March 31, 2009 that there were errors in each of the Proofs of Claim.

10 Mr. Rawding incorrectly attributed $1,720,035.38 as debt by Acadian Mining to Royal Roads when it should have been debt owed by ScoZinc to Royal Roads. In addition, during year end audit procedures for Royal Roads, Acadian Mining and ScoZinc, other erroneous entries were discovered. The total claim that should have been advanced by Royal Roads was $2,772,734.19.

11 The appropriate claim that should have been submitted by Acadian Mining was $22,041,234.82, a reduction of $1,720,035.38. Both Royal Roads and Acadian Mining submitted revised Proofs of Claim on March 25, 2009 with supporting documentation.

12 The third claim is by Komatsu. Its initial Proof of Claim was dated March 16, 2009 for both secured and unsecured claims of $4,245,663.78. The initial claim did not include a secured claim for the equipment that had been returned to Komatsu, nor include a claim for equipment that was still being used by ScoZinc. A revised Proof of Claim was filed by Komatsu on March 26, 2009.

13 The Monitor, sets out in its fifth report dated March 31, 2009, that after reviewing the relevant books and records, the errors in the Proofs of Claim by Royal Roads, Acadian Mining and Komatsu were due to inadvertence. For all of these claims it issued a Notice of Revision or Disallowance on March 27, 2009, allowing the claims as revised "if it is determined by the court that the Monitor has the power to do so".

14 The request for directions and the circumstances pose the following issue:

Issue

15 Does the Monitor have the authority to allow the revision of a claim by increasing it based on evidence submitted by a claimant within the time period set for the monitor to carry out its assessment of claims?

Analysis

16 The jurisdiction of the Monitor stems from the jurisdiction of the court granted to it by the *CCAA*. Whenever an order is made under s.11 of the *CCAA* the court is required to appoint a monitor. Section 11.7 of the *CCAA* provides:

11.7(1) When an order is made in respect of a company by the court under section 11, the court shall at the same time appoint a person, in this section and in section 11.8 referred to as "the monitor", to monitor the business and financial affairs of the company while the order remains in effect.

(2) Except as may be otherwise directed by the court, the auditor of the company may be appointed as the monitor.

(3) The monitor shall

(a) for the purposes of monitoring the company's business and financial affairs, have access to and examine the company's property, including the premises, books, records, data, including data in electronic form, and other financial documents of the company to the extent necessary to adequately assess the company's business and financial affairs;

(b) file a report with the court on the state of the company's business and financial affairs, containing prescribed information,

(i) forthwith after ascertaining any material adverse change in the company's projected cash-flow or financial circumstances,

(ii) at least seven days before any meeting of creditors under section 4 or 5, or

(iii) at such other times as the court may order;

(c) advise the creditors of the filing of the report referred to in paragraph (b) in any notice of a meeting of creditors referred to in section 4 or 5; and

(d) carry out such other functions in relation to the company as the court may direct.

...

17 It appears that the purpose of the *CCAA* is to grant to an insolvent company protection from its creditors in order to permit it a reasonable opportunity to restructure its affairs in order to reach a compromise or arrangement between the company and its creditors. The court has the power to order a meeting of the creditors or class of creditors for them to consider a compromise or arrangement proposed by the debtor company (s. 4, 5). Where a majority of the creditors representing two thirds value of the creditors or class of creditors agree to a compromise or arrangement, the court may sanction it and thereafter such compromise or arrangement is binding on all creditors, or class of creditors (s. 6).

18 Section 12 of the *Act* defines a claim to mean "any indebtedness, liability or obligation of any kind that, if unsecured, would be a debt provable in bankruptcy within the meaning of the *Bankruptcy and Insolvency Act*." However, as noted by McElcheran in *Commercial Insolvency in Canada* (LexisNexis Canada Inc., Markham, Ontario, 2005 at p. 279-80) the *CCAA* does not set out a process for identification or determination of claims; instead, the Court creates a claims process by court order.

19 The only guidance provided by the *CCAA* is that in the event of a disagreement the amount of a claim shall be determined by the court on summary application by the company or by the creditor. Section 12(2) of the *Act* provides:

Determination of amount of claim

(2) For the purposes of this Act, the amount represented by a claim of any secured or unsecured creditor shall be determined as follows:

(a) the amount of an unsecured claim shall be the amount

(i) in the case of a company in the course of being wound up under the Winding-up and Restructuring Act, proof of which has been made in accordance with that Act,

(ii) in the case of a company that has made an authorized assignment or against which a bankruptcy order has been made under the Bankruptcy and Insolvency Act, proof of which has been made in accordance with that Act, or

(iii) in the case of any other company, proof of which might be made under the Bankruptcy and Insolvency Act, but if the amount so provable is not admitted by the company, the amount shall be determined by the court on summary application by the company or by the creditor; and

(b) the amount of a secured claim shall be the amount, proof of which might be made in re-

spect thereof under the Bankruptcy and Insolvency Act if the claim were unsecured, but the amount if not admitted by the company shall, in the case of a company subject to pending proceedings under the Winding-up and Restructuring Act or the Bankruptcy and Insolvency Act, be established by proof in the same manner as an unsecured claim under the Winding-up and Restructuring Act or the Bankruptcy and Insolvency Act, as the case may be, and in the case of any other company the amount shall be determined by the court on summary application by the company or the creditor.

20 The only parties who appeared on this motion were the Monitor, ScoZinc and Komatsu. No specific submissions were requested nor made by the parties with respect to the nature of the court's jurisdiction to determine the mechanism and time lines to classify and quantify claims against the debtor company.

21 Under the *Bankruptcy and Insolvency Act* the Trustee is the designated gatekeeper who first determines whether a Proof of Claim submitted by a creditor is valid. The trustee may admit the claim or disallow it in whole or in part (s.135(2) *BIA)*. A creditor who is dissatisfied with a decision by the trustee may appeal to a judge of the Bankruptcy Court.

22 In contrast, the *CCAA* does not set out the procedure beyond the language in s.12. The language only accomplishes two things. The first is that the debtor company can agree on the amount of a secured or unsecured claim; and secondly, if there is a disagreement, then on application of either the company or the creditor, the amount shall be determined by the court on "summary application".

23 The practice has arisen for the court to create by order a claims process that is both flexible and expeditious. The Monitor identifies, by review of the debtor's records, all potential claimants and sends to them a claim package. To ensure that all creditors come forward and participate on a timely basis, there is a provision in the claims process order requiring creditors to file their claims by a fixed date. If they do not, subject to further relief provided by the claims process order, or by the court, the creditor's claim is barred.

24 If the Monitor disagrees with the claim, and the disagreement cannot be resolved, then a claimant can present its case to a claims officer who is usually given the power to adjudicate disputed claims, with the right of appeal to a judge of the court overseeing the *CCAA* proceedings.

25 The establishment of a claims process utilizing the monitor and or a claims officer by court order appears to be a well accepted practice (See for example *Federal Gypsum Co., Re*, 2007 NSSC 384 (N.S. S.C.); *Olympia & York Developments Ltd. v. Royal Trust Co.* (1993), 17 C.B.R. (3d) 1 (Ont. Gen. Div.); *Air Canada, Re* (2004), 2 C.B.R. (5th) 23 (Ont. S.C.J. [Commercial List]); *Triton Tubular Components Corp., Re*, [2005] O.J. No. 3926 (Ont. S.C.J.); *Muscletech Research & Development Inc., Re*, [2006] O.J. No. 4087 (Ont. S.C.J.); *Pine Valley Mining Corp., Re*, 2008 BCSC 356 (B.C. S.C.); *Blue Range Resource Corp., Re*, 2000 ABCA 285 (Alta. C.A.); *Carlen Transport Inc. v. Juniper Lumber Co. (Monitor of)* (2001), 21 C.B.R. (4th)

222 (N.B. Q.B.).)

26 I could find no reported case that doubt the authority of the court to create a claims process. Kenneth Kraft in his article "The CCAA and the Claims Bar Process", (2000), 13 *Commercial Insolvency Reporter* 6, endorsed the utilization of a claims process on the basis of reliance on the court's inherent jurisdiction, provided the process adhered to the specific mandates of the *CCAA*. In unrelated contexts, caution has been expressed with respect to reliance on the inherent jurisdiction of the superior court as the basis for dealing with the myriad issues that can arise under the *CCAA* (See: *Skeena Cellulose Inc., Re* (2003), 43 C.B.R. (4th) 187 (B.C. C.A.)) and *Stelco Inc., Re*, [2005] O.J. No. 1171 (Ont. C.A.)).

27 Sir J.H. Jacob, Q.C. in his seminal article "The Inherent Jurisdiction of the Court", (1970) *Current Legal Problems* 23, concluded that it has been clear law from the earliest times that superior courts of justice, as part of their inherent jurisdiction, have the power to control their own proceedings and process. He wrote:

> Under its inherent jurisdiction, the court has power to control and regulate its process and proceedings, and it exercises this power in a great variety of circumstances and by many different methods. Some of the instances of the exercise of this power have been of far-reaching importance, others have dealt with matters of detail or have been of transient value. Some have involved the exercise of administrative powers, others of judicial powers. Some have been turned into rules of law, others by long usage or custom may have acquired the force of law, and still others remain mere rules of practice. The exercise of this power has been pervasive throughout the whole legal machinery and has been extended to all stages of proceedings, pre-trial, trial and post-trial. Indeed, it is difficult to set the limits upon the powers of the court in the exercise of its inherent jurisdiction to control and regulate its process, for these limits are coincident with the needs of the court to fulfil its judicial functions in the administration of justice.
>
> p. 32-33

28 The *CCAA* gives no specific guidance to the court on how to determine the existence, nature, validity or extent of a claim against a debtor company. As noted earlier, the only reference is in s. 12 of the *Act* that if there is a dispute as to the amount of a claim, then the amount shall be determined by the court "on summary application". In *Freeman, Re*, [1922] N.S.J. No. 15, [1923] 1 D.L.R. 378 (N.S. C.A.) (en banc) the court considered the words "on summary application" as they appeared in the *Probate Act* R.S.N.S. 1900 c.158. Harris C.J. wrote:

[17] The words "summary application" do not mean without notice, but simply imply that the proceedings before the Court are not to be conducted in the ordinary way, but in a concise way.

[18] The Oxford Dictionary p. 140 gives as one of the meanings of "summary" dispensing with needless details or formalities — done with despatch.

[19] In the case of the Western &c R. *Co. v. Atlanta* (1901), 113 Ga. 537, the meaning of the words "summary proceeding" is discussed at some length and the Court held at pp. 543-544: —

> "In a summary manner does not at all mean that they may be abated without notice or hearing, but simply that it may be done without a trial in the ordinary forms prescribed by law for a regular judicial procedure."
>
> [20] I cite this not because it is a binding authority, but because its reasoning commends itself to my judgment and I adopt it.

29 In my opinion, whatever process may be appropriate and necessary to adjudicate disputed claims that ultimately end up before a judge of the superior court, the determination by the court that claims must initially be identified and assessed by the Monitor, and heard first by a Claims Officer, is a valid exercise of the court's inherent jurisdiction.

30 The *CCAA* gives to the court the express and implied jurisdiction to do a variety of things. They need not all be enumerated. The court is required to appoint a monitor (s.11.7). Once appointed, the monitor is required to monitor the company's business and financial affairs. The *Act* mandates that the monitor have access to and examine the company's property including all records. The monitor must file a report with the court on the state of the company's business and financial affairs and contain prescribed information. In addition, the monitor shall carry out such other functions in relation to the company as the court may direct (s.11.7(3)(d)).

31 In these circumstances, it is not only logical, but eminently practical that the monitor, as an officer of the court, be directed by court order to fulfil the analogous role to that of the trustee under the *BIA*. The Claims Procedure Order of February 18, 2009 accomplishes this.

Power of the Monitor

32 The Monitor was required by the Order to publish a notice to claimants in the newspaper regarding the claims procedure. It was also required to send a claims package to known potential claimants identified by the Monitor through its review of the books and records of ScoZinc. The claims bar date was set as March 16, 2009, or such later date as may be ordered by the court.

33 The duties of the Monitor, once a claim was received by it, were set out in paragraphs 9 and 10 of the Claims Procedure Order. They provide as follows:

9. Upon receipt of a Proof of Claim:

> a. The Monitor is hereby authorized and directed to use reasonable discretion as to the adequacy of compliance as to the manner in which Proofs of Claim are completed and executed and may, where it is satisfied that a Claim has been adequately proven, waive strict compli-

ance with the requirements of this Order as to the completion and the execution of a Proof of Claim. A Claim which is accepted by the Monitor shall constitute a Proven Claim;

b. the Monitor and ScoZinc may attempt to consensually resolve the classification and amount of any Claim with the claimant prior to accepting, revising or disallowing such Claim; and

...

10. The Monitor shall review all Proofs of Claim filed on or before the Claims Bar Date. The Monitor shall accept, revise or disallow such Proofs of Claim as contemplated herein. The Monitor shall send a Notice of Revision or Disallowance and the form of Notice of Dispute to the Claimant as soon as the Claim has been revised or disallowed but in any event no later than 11:59 p.m. (Halifax time) on March 27, 2009 or such later date as the Court may order. Where the Monitor does not send a Notice of Revision or Disallowance by the aforementioned date to a Claimant who has submitted a Proof of Claim, the Monitor shall be deemed to have accepted such Claim.

34 Any person who wished to dispute a Notice of Revision or Disallowance was required to file a notice to the monitor and to the Claims Officer no later than April 6, 2009. The Claims Officer was designated to be Richard Cregan, Q.C., serving in his personal capacity and not as Registrar in Bankruptcy. Subject to the direction of the court, the Claims Officer was given the power to determine how evidence would be brought before him and any other procedural matters that may arise with respect to the claim. A claimant or the Monitor may appeal the Claims Officer's decision to the court.

35 The Monitor suggests that the power given to it under paragraph 9(a) and 10 is sufficient to permit it to accept the revised Proofs of Claim filed after the claim's bar date of March 16, 2009, but before its assessment date of March 27, 2009.

36 Reliance is also placed on the decision of the Alberta Court of Appeal in *Blue Range Resource Corp., Re*, 2000 ABCA 285 (Alta. C.A.). As noted by the Monitor, the decision in *Blue Range* did not directly deal with the issue on which the Monitor here seeks directions. In *Blue Range*, the claims procedure established by the court set the claims bar date of June 15, 1999. Claims of creditors not proven in accordance with the procedures set out were deemed to be forever barred. Some creditors filed their Notice of Claim after the claims bar date. The monitor disallowed their claims. There were a second group of creditors who filed their Notice of Claim prior to the applicable claims bar date, but then sought to amend their claims after the claims bar date had passed. The monitor also disallowed these claims as late. What is not clear from the reported decisions is whether this second group of creditors requested amendments of their claims during the time period granted to the Monitor to carry out its assessment.

37 The chambers judge allowed the late and amended claims to be filed. Enron Capital Corp.

and the creditor's committee sought leave to appeal that decision. Leave to appeal was granted on January 14, 2000 with respect to the following question:

> What criteria in the circumstances of these cases should the Court use to exercise its discretion in deciding whether to allow late claimants to file claims which, if proven, may be recognized, notwithstanding a previous claims bar order containing a claims bar date which would otherwise bar the claim of the late claimants, and applying the criteria to each case, what is the result?

Blue Range Resource Corp., Re, 2000 ABCA 16 (Alta. C.A. [In Chambers])

38 Wittmann J.A. delivered the judgment of the court. He noted that all counsel conceded that the court had the authority to allow the late filing of claims and that the appeal was really a matter of what criteria the court should use in exercising that power. Accordingly, a Claims Procedure Order that contains a claims bar date should not purport to forever bar a claim without a saving provision. Wittmann J.A. set out the test for determining when a late claim may be included to be as follows:

[26] Therefore, the appropriate criteria to apply to the late claimants is as follows:

> 1. Was the delay caused by inadvertence and if so, did the claimant act in good faith?
>
> 2. What is the effect of permitting the claim in terms of the existence and impact of any relevant prejudice caused by the delay?
>
> 3. If relevant prejudice is found can it be alleviated by attaching appropriate conditions to an order permitting late filing?
>
> 4. If relevant prejudice is found which cannot be alleviated, are there any other considerations which may nonetheless warrant an order permitting late filing?
>
> [27] In the context of the criteria, "inadvertent" includes carelessness, negligence, accident, and is unintentional. I will deal with the conduct of each of the respondents in turn below and then turn to a discussion of potential prejudice suffered by the appellants.

2000 ABCA 285 (Alta. C.A.)

39 The appellants claimed that they would be prejudiced if the late claims were allowed because if they had known the late claims would be allowed they would have voted differently. This assertion was rejected by the chambers judge. With respect to what is meant by prejudiced, Wittmann J.A. wrote:

> 40 In a CCAA context, as in a BIA context, the fact that Enron and the other Creditors will

receive less money if late and late amended claims are allowed is not prejudice relevant to this criterion. Re-organization under the CCAA involves compromise. Allowing all legitimate creditors to share in the available proceeds is an integral part of the process. A reduction in that share can not be characterized as prejudice: Re Cohen (1956), 36 C.B.R. 21 (Alta. C.A.) at 30-31. Further, I am in agreement with the test for prejudice used by the British Columbia Court of Appeal in 312630 British Columbia Ltd. It is: did the creditor(s) by reason of the late filings lose a realistic opportunity to do anything that they otherwise might have done? Enron and the other creditors were fully informed about the potential for late claims being permitted, and were specifically aware of the existence of the late claimants as creditors. I find, therefore, that Enron and the Creditors will not suffer any relevant prejudice should the late claims be permitted.

40 In considering how the Monitor should carry out its duties and responsibilities under the Claims Procedure Order it is important to note that the Monitor is an officer of the court and is obliged to ensure that the interests of the stakeholders are considered including all creditors, the company and its shareholders (See *Laidlaw Inc., Re* (2002), 34 C.B.R. (4th) 72 (Ont. S.C.J. [Commercial List]).

41 In a different context Turnball J.A. in *Siscoe & Savoie v. Royal Bank* (1994), 29 C.B.R. (3d) 1 (N.B. C.A.) commented that the monitor is an agent of the court and as a result is responsible and accountable to the court, owing a fiduciary duty to all of the parties (para. 28).

42 In my opinion, para. 9(a) is not of assistance in determining the authority of the Monitor to revise upward a claim filed after the claim's bar date but before the assessment date. Paragraph 9(a) authorizes the Monitor to use reasonable discretion as to the adequacy of compliance as to *the manner* to which Proofs of Claim are completed and executed. If it satisfied that the claim has been adequately proven it may waive strict compliance with the requirements of the order as to *completion* and the *execution* of a Proof of Claim.

43 Paragraph 10 of the Claims Procedure Order mandates the Monitor shall review all Proofs of Claim filed on or before the claims bar date. It shall "accept, revise or disallow such Proofs of Claim as contemplated herein". While normally a monitor's revision would be to reduce a Proof of Claim, there is in fact nothing in the Claims Procedure Order that so restricts the Monitor's authority. It is obviously contemplated by para. 10 that the monitor is to carry out some assessment of the claims that are submitted.

44 In my view, the Proofs of Claim that are filed act both as a form of pleading and an opportunity for the claimant to provide supporting documents to evidence its claim. In the case before me, the creditors discovered that the claims they had submitted were inaccurate and further evidence was tendered to the Monitor to demonstrate. The Monitor, after reviewing the evidence, accepted the validity of the claims.

45 Courts in a general way are engaged in dispensing justice. They do so by setting up and

applying procedural rules to ensure that litigants are afforded a fair hearing. The resolution of disputes through the litigation process, including the ultimate hearing, is fundamentally a truth-seeking process to determine the facts and to apply the law to those facts. Can it be any different where the process is not in the court but under its supervision pursuant to a claims process under the *CCAA.?*

46 To suggest that the monitor does not have the authority to receive evidence and submissions and to consider them is to say that it does not have any real authority to carry out its court appointed role to assess the claims that have been submitted. The notion that the monitor cannot look at documentary evidence on its own initiative or at the instance of a claimant, and even consider submissions, is to deny it any real power to consider and make a preliminary determination of the merits of a claim.

47 The Claims Procedure Order contains a number of provisions that anticipate the exchange of information between the Monitor, the company and a creditor. Paragraph 9(b) authorizes the Monitor and ScoZinc to attempt to consensually resolve the classification and the amount of any claim with a claimant prior to accepting, revising or disallowing such claim. Paragraph 17 of the Claims Procedure Order directs that the Monitor shall at all times be authorized to enter into negotiations with claimants and settle any claim on such terms as the Monitor may consider appropriate.

48 In my opinion, it does not matter that revised claims were submitted after the claims bar date. In essence, the Monitor simply acted to revise the Proofs of Claim already submitted to conform with the evidence elicited by the Monitor, or submitted to it. The Monitor had the necessary authority to revise the claims, either as to classification or amount.

49 If a claimant seeks to revise or amend its claim after the assessment date set out in the Claims Procedure Order, different considerations may come into play. The appropriate procedure will depend on the provisions of the Claims Procedure Order. In addition, the court, as the ultimate arbiter of disputed claims under s. 12 of the *CCAA*, should always be viewed as having the jurisdiction to permit appropriate revision of claims.

Order accordingly.

END OF DOCUMENT

Action No. 0901-13483

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL DISTRICT OF CALGARY

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF TRIDENT EXPLORATION CORP., FORT ENERGY CORP., FENERGY CORP., 981384 ALBERTA LTD., 981405 ALBERTA LTD., 981422 ALBERTA LTD., TRIDENT RESOURCES CORP., TRIDENT CBM CORP., AURORA ENERGY LLC., NEXGEN ENERGY CANADA, INC. AND TRIDENT USA CORP.

BRIEF OF ARGUMENT OF THE PETITIONERS

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